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COMPULSORY COMPETITIVE TENDERING FOR LOCAL AUTHORITY SERVICES

A LEGAL ANALYSIS OF THE LOCAL GOVERNMENT ACTS
1988 AND 1992

BY
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PRESENTED FOR THE DEGREE OF DOCTOR OF PHILOSOPHY IN
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ABSTRACT

One of the most significant developments affecting local government in the past fifteen years has been the imposition of compulsory competitive tendering. Initially compulsory competitive tendering (CCT), as imposed by the Local Government, Planning and Land Act 1980, only affected the ability of local authorities to perform construction and maintenance work via their Direct Labour Organisations. However, the Local Government Acts 1988 and 1992 now establish a CCT regime for local authority services: this study will examine the development of this regime, rather than that established by the 1980 Act, and evaluate its provisions.

This study will be divided into three major Parts. The first will examine the policy developments which preceded the establishment of compulsory competitive tendering for local authority services by virtue of Part I of the Local Government Act 1988, and then consider the developments in policy which led to the subsequent expansion of the range of services subject to CCT and the refinement of the tendering regime which has followed the enactment of the Local Government Act 1992. It is intended to consider the development of the CCT regime within the context of wider legislative developments in local government over the past fifteen years, and of wider policy initiatives relating to the institutional structure and role of both central and local government.

The second, and main, Part of the research will be a detailed evaluation of the tendering regime which applies when local authorities wish to perform work via Direct Service Organisations. This regime is put in place by the Local Government Acts 1988 and 1992, and the delegated legislation issued pursuant to those statutes. A wide number of issues will be considered in this Part of the research.

First, as the intention is to evaluate the provisions of the domestic legislation against the standards set by the EC Services

Directive (Directive 92/50) in particular, it is necessary to assess whether that Directive applies in the same circumstances, and to the same services, as the domestic legislation. In the course of doing so the nature and content of the services currently subject to CCT will be considered.

The next task will be to examine the tendering regime contained in Part I of the Local Government Act 1988. The tendering regime requires local authorities to fulfil a number of conditions before awarding work to Direct Service Organisations, each of which will be considered in turn. One of the conditions is a prohibition of anti-competitive conduct. The concept of anti-competitive conduct is central to the operation of the CCT regime, permeating all stages of the tendering process, and therefore must receive extensive consideration.

A complex web of regulation has evolved around the basic prohibition of anti-competitive conduct contained in the Local Government Act 1988. The Secretary of State was endowed with a range of powers by the Local Government Act 1988 to define what would constitute anti-competitive conduct. Pursuant to these powers one set of regulations and Guidance on the avoidance of anti-competitive conduct have been issued. It is intended to evaluate the potential uses of the powers given to the Secretary of State by the 1992 Act, and to assess the propriety of the regulations and Guidance which have been issued against both domestic legislation and the objective standards set by the EC public procurement regime.

The 1988 Act, however, does not simply establish a tendering regime: it also establishes a system of imposing sanctions upon local authorities which fail to comply with the provisions of the tendering regime, or with related duties concerning the maintenance of accounts and performance of work. This system of redressing failures, which places considerable power in the hands of the Secretary of State, will be examined and evaluated. In evaluating this element of the statutory regime particular attention will be paid to the corresponding element of the EC

public procurement regime, which in this instance is the Compliance Directive (Directive 89/665). Having considered the way in which the statutory regime seeks to redress failures to comply with the prescribed tendering process, attention will then be given to the way in which aggrieved contractors may seek redress through the courts for the failure of local authorities to comply with standards required by domestic and EC law in the conduct of tendering procedures.

There is one other issue affecting the CCT regime which will be considered: namely the additional requirements imposed by Part II of the Local Government Act 1988. Part II, which contains the non-commercial considerations regime, has an impact upon all aspects of the procurement activities of local authorities, although particular attention will be paid to its impact upon the CCT regime established by Part I of the 1988 Act. Part II essentially does three things: it forbids local authorities to take non-commercial considerations into account in the award of contracts and during the conduct of their contractual relationships; establishes a duty to give reasons in certain circumstances; and clarifies the rights of action available to those contractors who allege that local authorities have referred to a non-commercial consideration in the course of their contractual relationships. The provisions of Part II will be examined in detail, and their propriety will be assessed against the relevant EC legislation.

Three other issues will be considered in the course of this study. The first is the extent to which it can now be said that a body of law which specifically regulates the contractual relationships of public authorities exists, contrary to the orthodoxy that the contracts of public authorities are subject to the ordinary law. This will involve examination of the degree to which the contractual relationships of central and local government, and the NHS, are now regulated, and consideration of the impact of the EC public procurement regime.

Second, the third Part of this study will consider the impact of CCT upon the accountability of local authorities for the provision

of services. This will involve examination of the duties imposed by the 1988 and 1992 Acts regarding the maintenance of accounts, the attainment of financial objectives and the dissemination of information. The interaction of the legislation's provisions with the other statutory procedures regarding the financial accountability of local authorities will be reviewed. In addition the wider issue of how CCT affects the accountability of local authorities for the delivery of services via the traditional avenues of accountability (financial, legal and political) will be examined.

Finally, the conclusion will not only draw together the various issues raised during the earlier examination of the developments which have shaped the CCT regime, and the evaluation of the regime's provisions, but will also consider the direction which future developments may take

ACKNOWLEDGEMENTS

As is so often the case it is impossible to thank individually all of those who have assisted me during the conduct of this research. Consequently, to all of those people who have provided assistance and proffered advice over the past three years I extend both my gratitude, and also my apologies if I fail to single you out for individual praise. However, particular thanks must be extended to a number of individuals.

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Finally, I must extend my thanks to my parents, Patrick and Theresa, who have indulged the occasionally irrational and eccentric behaviour which accompanies the conduct of research, especially when one is burdened with a temperamental computer printer. Without their support and sacrifice, particularly in the difficult circumstances of the first seven months during which I was conducting this research, its completion would not have been possible: it is to them, above all others, that this work is dedicated.

Fintan M. McShane
October 1995

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INTRODUCTION

The years since 1979 have witnessed almost unparalleled legislative activity in the field of local government, with the multitude of statutes enacted during this period effecting some profound changes on local government in the United Kingdom. Amongst other things changes have been made to the structure of local government¹, the financing of local government², the conduct of local authority business³, and the way in which local authorities perform their various functions.

It is the last of these with which this research will be concerned. Three statutes enacted over the past fifteen years have been of particular relevance in shaping the way in which local authorities perform their functions: the Local Government, Planning and Land Act 1980⁴; the Local Government Act 1988⁵; and the Local Government Act 1992⁶. The first of these, the 1980 Act, introduced compulsory competitive tendering (CCT) for construction and maintenance work⁷. The second, the 1988 Act imposed CCT upon the performance of a variety of local authority services⁸. Finally, the 1992 Act was intended to enable the establishment of a tendering regime for white-collar services⁹, endowed the Secretary of State with powers to regulate further certain elements of the tendering

¹ See e.g. Local Government Act 1992 Part II; Local Government (Wales) Act 1994; Local Government (Scotland) Act 1994

² The statutes relating to local government finance are almost too numerous to enumerate. To give some example of the volume of legislation on this matter see e.g. Local Government, Planning and Land Act 1980, Part VI; the Local Government Finance Acts 1982, 1987, 1988 and 1992; Rates Act 1984 and the Abolition of Domestic Rates (Scotland) Act 1987

³ Local Government and Housing Act 1989, Part I

⁴ 1980 c.65

⁵ 1988 c.9

⁶ 1992 c. 19

⁷ 1980 Act, Part III

⁸ 1988 Act, Part I

⁹ 1992 Act, S8

procedures established by the earlier legislation¹⁰, and effected significant substantive amendments to the 1980 and 1988 Acts. Unfortunately, for reasons of space, consideration of the tendering and accounting regime contained in the Local Government Planning and Land Act 1980 has had to be excised from this research, although that statute will be considered to the extent to which it is relevant in tracing policy developments regarding CCT. Likewise, the provisions of the Environmental Protection Act 1990 regarding competitive tendering for waste disposal will not be considered for reasons of space.

The central part of this research is, therefore, an examination of the legal regime established by the Local Government Acts 1988 and 1992¹¹: essentially CCT for local authority services. This involves consideration not only of the services subject to CCT by virtue of the 1988 Act¹², and of the provisions of the tendering regime contained in Part I of that statute¹³, but also a detailed examination of the system of regulation which has developed around the prohibition of anti-competitive practices contained in the legislation¹⁴. In addition, the non-commercial considerations regime set out in Part II of the 1988 Act, which permeates all aspects of local government procurement, will be considered as its provisions will obviously have an impact on tendering procedures conducted under the 1988 Act¹⁵. Furthermore, the examination of the statutory regime is supplemented by consideration of the practice of CCT, and its impact on the organisation and working practices of local authorities: in order to do so it has been necessary to interview the officers of a number of local authorities. In examining the tendering regime two issues of particular salience must be considered. The first is the extent to which the subordinate legislation which is a significant element of the tendering regime is in accordance with the primary legislation: as will be seen this is a problem with

¹⁰ S9

¹¹ See Part II

¹² See part II, Ch 1

¹³ See Part II, Ch 2

¹⁴ See Part II, Ch 3,4

¹⁵ See Part II, Ch 6

regard to the issue of anti-competitive conduct in particular¹⁶. The second, and arguably the more important, is the relevance of the EC public procurement regime.

In evaluating any piece of domestic legislation today it is necessary to bear in mind the potential impact of EC law. This is no less the case when examining the CCT regime established by the Local Government Acts 1988 and 1992, as it is with other statutes. As the regime contained in the 1988 and 1992 Acts concerns CCT for local authority services, the element of the EC public procurement regime which is of most relevance to evaluating the domestic legislation is the Services Directive¹⁷. However, while consideration of the EC public procurement regime must permeate evaluation of the tendering regime, there is one factor which presently limits the utility of the Services Directive in doing so. Although, as shall be seen¹⁸, there is considerable identity between the services subject to CCT and those set out in the Services Directive, the Directive itself makes a distinction between services as to the extent to which the tendering procedures contained in the Directive apply¹⁹. This two-tier application of the Directive means that a range of the service subject to CCT will be evaluated against the standards of the Services Directive in its entirety, while others may only be evaluated against a more limited range of the Directive's provisions. This may make the evaluation of the domestic legislation a slightly more complex exercise, but, fortunately, it is proposed that any revision of the Directive will consider the discontinuation of its two tier application²⁰. If that is the case, then the comments made regarding the compatibility of the domestic legislation with the Directive will, in future, apply with equal force to those services which are subject to CCT but which are not currently subject to all of the provisions of the Services Directive. However, it must be emphasised that the two-tier application of provisions only applies to the Services Directive: the general principles of EC law, and the

¹⁶ Part II, Ch 3,4

¹⁷ Dir. 92/50

¹⁸ Part II, Ch 1

¹⁹ See Articles 8- 10

²⁰ Article 43

provisions of the Treaty of Rome may be used to evaluate all aspects of the domestic tendering regime.

In considering whether the 1988 and 1992 Acts, and the Services Directive apply in the same circumstances, there is one other issue which must be considered. This is the requirement that the agreements which are the result of the operation of a tendering procedure are of the nature of a contract. As will be seen, some have contended that the majority of agreements arising from the operation of the 1988 Act cannot represent a contract²¹. However, it would appear that there is a compelling argument in support of the proposition that, in certain limited circumstances, the agreements resulting from the 1988 Act's operation will be a contract for the purposes of the Directive²²

There is one other aspect of the regime put in place by the 1988 and 1992 Acts which must be considered, namely the system of investigating and issuing sanctions for alleged breaches of the tendering regime, and failures to comply with the accounting regime²³. The statutory regime endows the Secretary of State with extensive powers to investigate alleged breaches of the statutory regime and impose sanctions. While doing so it is also necessary to evaluate the Secretary of State's powers against the standards set out in the relevant EC legislation, namely the Compliance Directive²⁴, in order to ascertain whether the procedures contained in the 1988 Act provide sufficient protection for aggrieved contractors whenever a breach of EC law is at issue. It is also convenient to consider the other means by which aggrieved contractors may seek redress for a local authority's failure to comply with the tendering regimes contained in the 1988 Act, and the Services Directive.

One final issue arising from the operation of the legislation must be addressed. The essential question to be asked is: are the

²¹ See Part II, Ch 1

²² Ibid.

²³ See Part II, Ch 5

²⁴ Directive 89/665

agreements resulting from the operation of the CCT legislation indicative of a deeper trend towards the development of an administrative law of contract? The thesis will examine the extent to which the 1988 and 1992 Acts, and European legislation, put in place a set of principles which regulate the contracts of public authorities, and whether other domestic developments provide support for this trend²⁵.

However, while the main theme of this research will be a consideration of the regime established by the 1988 and 1992 Acts, two other important issues must be considered. The first is that of the policy developments which have resulted in the enactment of CCT legislation. The second issue is the way in which CCT affects accountability for the provision of local authority services.

The first Part of this research will be concerned primarily with the policy developments which led to the Local Government Act 1988's imposition of CCT, and to the various changes in the statutory regime which have subsequently taken place. The starting point for this examination is a consideration of the development of local government service provision²⁶. This involves a brief consideration of the way in which local authorities acquired their various functions, and also, more importantly, the way in which those functions have been performed. The question to be posed is: has it ever been assumed automatically that services must be directly provided by the local authority workforce?

Having considered the extent to which local authorities acquired their functions, and the extent to which those functions were directly provided, attention then must be turned to the series of developments which led to the imposition of CCT. The first statute which imposed CCT was the Local Government, Planning and Land Act 1980. The circumstances which produced this legislation would appear to have been different from those which produced the 1988 and 1992 Acts. The 1980 Act would appear to have been the product of a considerable amount of consensus between Government and

²⁵ See Part II, Ch 7

²⁶ See Part I, Ch 1

Opposition which had its roots in their common acceptance of the findings of an independent report in the mid-1970s which had been highly critical of the efficiency of building and works Direct Labour Organisations, and recommended that such bodies should only perform construction and maintenance work where they had won it in open competition, and should be subject to a rigorous accounting regime in order that their performance could be monitored²⁷.

The 1980 Act thus appears to belong to a different era of politics from subsequent CCT legislation. However, there are many aspects of the development of CCT for local authority services which are of particular interest. The debate on the application of CCT to local authority services began soon after the 1980 Act was enacted²⁸. The initial impetus for the debate came from a peculiar source: rather than originating from ministers, or from a Conservative think-tank, competitive tendering and contracting-out of services were initially recognised as having certain benefits by a number of Conservative-controlled local authorities with a history of poor industrial relations during the Winter of Discontent of 1978-9. The benefits of competitive tendering and contracting-out appealed to both Conservative ministers and to think-tank ideologues. This necessitates some consideration of both what are perceived to be the benefits of CCT, and also why the pursuit of competitive tendering is compatible with the New Right ideology espoused by the Conservative Party in Government after 1979.

In tracing the development of Government policy on competitive tendering for local authority services during the 1980s one is struck by the problem of coherence. At first a policy of encouraging authorities to subject services to competitive tendering and contracting-out was followed²⁹, with a policy of compulsion being followed from 1985 onwards, although the first attempt to impose CCT was unsuccessful³⁰. When the Local Government Act 1988 was enacted, imposing CCT for a variety of essentially manual services,

²⁷ See Part I, Ch 2

²⁸ See Part I, Ch 3

²⁹ See Part I, Ch 3

³⁰ See Part I, Ch 4

and the establishment of the non-commercial considerations regime, it appeared that Government policy was not to extend CCT to services which were not sufficiently definable, or from which an insufficient level of savings would be realised. The adoption of these criteria appeared to preclude the extension of CCT to professional, technical and administrative services. The subsequent abandonment of this policy and the decision to seek to extend CCT to white-collar services, must be considered³¹.

While the extension of CCT to a new range of services, and particularly to white-collar services has perhaps been the most visible aspect of government policy since 1988, a no less important development has been the regulation of anti-competitive conduct. One of the defects of the 1988 Act was that, while it prohibited local authorities from doing anything anti-competitive in the course of awarding work to a Direct Service Organisation, it made no attempt to define what constituted such conduct, although one could attempt to divine what the Secretary of State considered to be anti-competitive by observing the circumstances in which he used his powers of investigation and sanction under S13 and S14 of the 1988 Act. The deficiencies of the 1988 Act were remedied by S9 of the 1992 Act, which permitted the Secretary of State to issue subordinate legislation in order to define conduct which would be anti-competitive. The matters which the Secretary of State has defined as being anti-competitive reveal much about the model of competition which the Government wishes to follow, and thus merit considerable consideration³².

When discussing CCT, one must always bear in mind the wider context in which the legislative developments have occurred. Two themes must be developed here. The first is the extent to which the CCT legislation reflects the trend which has become particularly obvious in the past fifteen years of enacting legislation which is intended to restrict the amount of discretion which local authorities enjoy. The 1988 and 1992 Acts enact a series of provisions which attempt closely to circumscribe the amount of discretion which

³¹ See Part I, Ch 5

³² See Part I, Ch 5; Part II, Ch 3, 4

local authorities enjoy in making decisions about the delivery of services. The second theme is the position of CCT in relation to initiatives to reform the way in which services are provided in both central and local government. However, these initiatives themselves must be placed within the context of the wider issue of the restructuring of the role and institutions of central and local government which has occurred in recent years³³. Thus, for example, the importance of competitive tendering to the concept of the enabling authority which has been of such importance to the restructuring of local government will be considered.

The final issue which will be considered is that of the implications of CCT upon accountability for local authority service delivery³⁴. This matter will be discussed after the tendering regime and the issues related to it have been considered in Part II. While it is not intended to explain the accounting regime established by the 1988 Act in detail, it will be necessary to consider some elements of it to the extent to which they impact upon accountability for the delivery of services. However, it is proposed not only to consider the issue of financial accountability, but also the other strands of accountability, namely political accountability and legal accountability, although many issues relating to the latter will have been considered to a great extent in the earlier chapter relating to the Secretary of State's powers of sanction and the remedies available to aggrieved contractors³⁵.

An extensive range of issues will therefore be considered during the course of the research. Before evaluating the provisions of the 1988 and 1992 Acts, and prior to considering the way in which CCT affects the accountability of local authorities, it is first necessary to consider the development of local authority service provision, and the policy developments surrounding the evolution of the compulsory competitive tendering regime for local authority services. The matters discussed are intended to reflect the legal position as at

³³ See Part I, Ch 5

³⁴ Part III, Ch 1

³⁵ Part II, Ch 5

1st June 1995, although in a few select instances events after that date will be considered.

PART I
CHAPTER 1
THE DEVELOPMENT AND PERFORMANCE OF LOCAL GOVERNMENT
FUNCTIONS

In examining the legislation establishing compulsory competitive tendering, one must not lose sight of what is regulated by the Local Government Acts 1988 and 1992: namely the manner in which the functions of local authorities are performed. As the sphere of local authority activity has never been a static one it is desirable to consider briefly the evolution of local authority functions, and the manner in which those functions have been performed, prior to examining the development of the compulsory competitive tendering regime, and the import of the legislation itself.

It must be emphasised that this chapter only seeks to examine the development of local authority functions, and trends relating to their performance, particularly the circumstances in which, and the extent to which, contracting out and competitive tendering have been resorted to. While the functions of local authorities have often been linked to their constitutional position, with, for example, certain statutes allocating functions to different tiers of government, it is felt that the constitutional development of local government merits extensive research in its own right. Consequently, changes in the constitutional arrangements of local government will only be considered to the extent that they affected the range of local authority functions and the manner of their performance.

The development of the functions of local authorities must be considered in relation to three periods. The first is the period prior to the 1830s. The second, stretching from the 1830's to 1945, is arguably the most significant due to the vast expansion of the scope of local government. The final period stretches from 1945 to the point in the 1970s at which the debate began on whether or not competitive tendering should be imposed upon local authorities in an attempt to improve their efficiency.

Local government prior to 1830

In comparison to today, local government prior to the 1830s could hardly be characterised as such. There were a number of reasons for this. The first relates to the organisational structure of local government:

"At the start of the nineteenth century the functions of local government were undertaken by a variety of bodies such as the municipal corporations, the justices of the peace, the parishes and a range of special purpose authorities"¹

For some time local administration had been in decline, and by the early nineteenth century neither its chaotic structure nor its personnel could cope with their task any longer². In England at least, the ineffectiveness of local government has been ascribed by some to the fact that those who administered it, primarily Justices of the Peace, were too few in number, and lacked the competence to perform the task with which they were charged³.

The second major reason why local government prior to 1830 bears little relationship to local government today is that it possessed comparatively few functions. Chief among these was administration of the Poor Law⁴. Other functions included maintenance of gaols and other houses of correction, policing, and the construction and maintenance of roads. While it was comparatively rare to do so, a few enlightened authorities did assume additional functions such as the provision of street lighting⁵, or established public utilities such as municipal gasworks⁶.

¹ Loughlin, *Local Government in the Modern State*, p4

² See Halevy, *Before 1835* in Laski et al, *A Century of Municipal Progress*; Clarke, *History of Local Government of the United Kingdom* (13th Ed, 1955) Ch IV; Redlich and Hirst, *Local Government in England* (1st Ed, 1903), Vol 1 pp 111-124. The system of local government in Scotland shared many of the deficiencies of its English counterpart: see Ross, *Early Scottish Local Government* [1946] 24 *Public Administration* 30.

³ See Halevy, *op. cit.* pp 24-7

⁴ See Clarke, *op. cit.* Chapters II, III on the administration of the Poor Law by local government bodies.

⁵ Manchester did so in 1806; Liverpool, Brighton, Nottingham and Sheffield in 1818; Birmingham and Bristol in 1819

⁶ Manchester, for example, did so in 1817

The functions of local authorities were, therefore, of a minimal nature. But how were they performed? Certainly parishes employed overseers of the poor and surveyors, who may often have been unwilling employees⁷, to administer poor relief, and build and maintain roads. Some authorities even required that those in receipt of poor relief should perform work for the parish under a system of parish employment which also necessitated the employment of a parish overseer. More interestingly, in performing their functions:

"Their main reliance for the fulfilment of these duties was in the characteristic device of eighteenth-century administration, the employment of a contractor. Up and down the country, in every conceivable service, the easiest way of getting the work done seemed to be to 'farm' it, or put it out to contract, to the man who offered the most advantageous terms." ⁸

It would therefore appear that during this period the use of contractors to perform the limited functions of local government was the norm, not the exception⁹, and that contractors were generally selected by some form of competitive tendering.

In their seminal work *English Local Government*, the Webbs make extensive reference to the use of competitive tendering by local authorities from at least the beginning of the eighteenth century:

"In 1712 the West Riding Justices, having spent over £538 a year during the past fourteen years in their casual bridge repairs, contracted, after tenders had been 'heard in open court' with four men for keeping in repair all the Riding bridges for eleven years for £350 a year"¹⁰

⁷ See MacColl and Hadfield, *British Local Government*, p14

⁸ B and S Webb, *Local Government in England*, Vol 1, *The Parish and the County*, at p525. See also Halevy, *Before 1835*, in *A Century of Municipal Progress*, at p26. See also Ross, who discusses corrupt practices in the "letting of contracts" in *Early Scottish Local Government*, [1946] 24 *Public Administration* 30 at p36

⁹ Indeed, it has been described as being of "almost universal prevalence" by the Webbs, *op. cit.*, p525

¹⁰ *English Local Government*, Vol 1, *The Parish and the County*, p513

Nor was the phenomenon confined to the Counties, as is illustrated by the corruption surrounding the construction of the Mansion House in the City of London:

" ... an inferior architect was chosen merely because he was a freeman. The various contracts for the building were not given to the lowest tenderers, but to those who had most interest in the council"¹¹

By the mid-eighteenth century the minimal functions of local government were ordinarily performed by contractors, who were selected following the submission of tenders, with the work ideally being awarded to the contractor who submitted the lowest tender. This was the case as regards both construction and maintenance work and, apparently, the other services provided by local authorities¹². As a result, the number of local authority employees was small. However, in the years after 1830, this would gradually change.

1830-1945: The Period of Expansion

The period stretching from the 1830s to 1945 is in many respects the period of most interest to those wishing to trace the development of local authority service provision. This era, the early part of which saw significant political changes, witnessed the emergence of truly effective local government and the immense expansion of the range of functions with which it was entrusted.

The advances made in the earlier part of this period cannot be divorced from the wider reform of the British system of government occurring at this time¹³. It was perhaps inevitable that measures to reform local government should follow the reforms of Parliament pursued in the Reform Act 1832. In 1833 Scottish burghs became

¹¹ See Vol 2, The Manor and the Borough, p649

¹² See Vol 1, The Parish and the County, p525

¹³ See Redlich and Hirst, Local Government in England, Vol I, Book I on the relationship between wider political change and local government reform in the nineteenth century.

more democratic by virtue of the Royal Burghs (Scotland) Act¹⁴, while the functions of burghs could be regulated to a not insignificant degree by the Burgh Police (Scotland) Act¹⁵, if a burgh's electors chose to adopt its provisions. However, arguably the most significant event of 1833 was the appointment of a Royal Commission "to enquire as to the existing state of the municipal corporations in England and Wales": the Commission's report on the constitutional position and administration of the municipalities resulted in the Municipal Corporations Act 1835 being passed. This statute was primarily concerned with the municipal franchise and with imposing some degree of uniformity upon the constitutional arrangements of municipalities: except for the administration of local revenues and finance, licensing, policing, and passing bye-laws for the good government of the town, little was said of the functions of local authorities. In spite of the fact that the Act's provisions only applied to the majority of municipalities, and thus to a small geographical area¹⁶, it assumed a far greater significance as:

"... proof of the excellence of the municipal organisation created by the Act of 1835 is to be found in the unparalleled expansion of local activities which followed, and in the extension of the principles of the Act to other parts of the field of local government. 'Local government has been municipalised' is the formula under which Englishmen summarise the history of the legislation which has ended in County, District, and Parish Councils. And not only has the structure of the municipal councils has been copied, but their modes of working and doing business ..." ¹⁷

The Municipal Corporations Act 1835 was thus the catalyst for two important trends. First, it marked the beginning of legislative activism in local government affairs, exemplified by the constitutional restructuring of various tiers of local government in the Municipal Corporations Act 1882, the Local Government Acts

¹⁴ 1833 c.76. Ross, op.cit., relates that this Act was the result of the investigations and reports of a select committee of the Commons from 1819-1821. If this is so it illustrates a lack of political will in tackling local government issues, and the tardiness of the legislative procedure

¹⁵ 1833 c.46

¹⁶ The Act did not apply to London, and only applied to 178 of the other 245 towns considered to exercise municipal powers by the Commissioners: the remaining 67 were considered too insignificant to be dealt with.

¹⁷ Redlich and Hirst, *Local Government in England* (1st Ed. 1903), Vol 1, p128

1888 and 1894, and the London Government Act 1899. Secondly, after the 1835 Act was passed, the sphere of local government activity began to expand, as authorities began to assume more functions. However, the Municipal Corporations Act itself had little to say about the functions of local authorities. This raises three questions. First, by what means did local authorities acquire new functions? Secondly, what functions did local authorities acquire? Finally, by what means did authorities perform their functions?

The functions acquired by local authorities during this period were, as one might expect, conferred by Act of Parliament. Prior to the 1830s powers and functions had almost invariably been acquired by private Act of Parliament. When the Municipal Corporations Act 1835 was passed:

"... Parliament interrupted a tradition of centuries by its first active interference with local government, it broke in upon a local autonomy which knew not general Acts, departments or duties."¹⁸

After 1835 functions were conferred upon authorities by means of one of four legislative instruments. The first was the private Act of Parliament, which meant that the authority petitioned Parliament to grant it additional powers. This was the means by which local authorities had traditionally sought to extend their powers. The second means of assuming powers were Clauses Acts¹⁹, which are essentially a half-way house between private Acts and public general Acts. Basically a public Act is passed by Parliament which provides a model set of clauses which do not confer powers on local authorities until they are adopted in a private Act. The third means of acquiring powers is an adoptive Act²⁰, which, once again stands half-way between a local and a public Act. These are essentially public Acts which do not come into force until their provisions are adopted by a local authority : the difference between a Clauses and an Adoptive Act is that a Clauses Act's provisions must be assumed

¹⁸ Willis, Parliament and the Local Authorities, in Laski et al, A Century of Municipal Progress, at p401

¹⁹ For a fuller explanation of this device see Willis, op.cit. For an example see the Towns Improvement Clauses Act 1847

²⁰ For a fuller explanation see Willis, op. cit. p402

via a private Act, but an Adoptive Act's provisions may be assumed without further legislative action. Finally, authorities may be endowed with additional powers and functions by virtue of public general Acts. From the late-nineteenth century onwards the public general Act assumed particular importance in imposing functions on local authorities: a prime example is the public health legislation enacted from 1875 onwards. However, while public general Acts may have assumed greater importance from the late-nineteenth century onwards in imposing functions upon local authorities, even as late as 1935 it could still be observed that:

"... Parliament is reluctant ... to cast any doubt upon its faith that the regular method for obtaining new powers should be by private Bill ..." ²¹

Local authorities' exercise of the powers and functions acquired during this period was subject to control by the courts, however. By the last quarter of the nineteenth century the law regarding the exercise of statutory functions was well developed, and the principles to be applied to questions of vires could be identified with considerable certainty:

"... where there is an Act of Parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose, what it does not expressly or impliedly authorise is to be taken as prohibited ... these things which are incident to, and may reasonably and properly be done under the main purpose, though they may not be literally within it, would not be prohibited." ²²

While this is not the place to discuss in detail the relationship between local authorities and the judiciary, it is clear that Lord Blackburn's statement of principle did not seek to impose unduly strict limitations on the activities of local authorities ²³.

²¹ See Willis, *op. cit.* p403, emphasis added. For a discussion of the frequency with which private Bills were used, their uses and expense, see Harris, *Municipal Self-Government in Britain* pp 116-122.

²² *A-G v Great Eastern Railway Co.* [1880] 5 App. Cas. 473, per Lord Blackburn at p478

²³ On this point see Loughlin, *the Restructuring of Central-Local Government Relations*, in Jowell and Oliver, *The Changing Constitution* (3rd Ed., 1994) at p266

Having examined the means by which functions were acquired during this period, one must now ask: which functions were acquired? Given the fact that throughout the era in question the principal means of acquiring new functions and powers was not a public general Act of universal application, but either a private Act (which may or may not have incorporated the terms of a clauses Act), or an adoptive Act, one cannot identify any universal range of functions acquired by authorities: except for those relatively few (although undeniably important) occasions on which public general Acts imposed functions, the fact that authorities acquired functions at their own initiative renders attempts to identify the functions possessed by each authority an immensely difficult exercise. However, while it is extremely difficult to identify the powers and functions of each individual local authority, it is possible to place the functions of local authorities within several broad categories. In *Local Government in the Modern State*, Loughlin placed the functions performed by local authorities during this era into three categories: public goods, redistributive services, and trading services²⁴.

Public goods can be identified by the fact that they are either non-excludable, or that it is practically impossible to charge inhabitants of the locality for the amount of the good being consumed, and by their non-rivalness: once the good is provided, it can be consumed without additional costs being incurred²⁵. The classic example is the provision of street lighting. Other examples would be the provision of pavements, and sewage facilities.

Initially many of the public goods were provided by virtue of powers contained in private Acts of Parliament²⁶. Almost inevitably, the next step was to provide the authority to perform these functions in adoptive Acts²⁷, and clauses Acts²⁸. Finally, public Acts gave local authorities the power to provide public goods, and, in the case of public health legislation in particular, imposed a duty to

²⁴ See pp 4-6

²⁵ Foster, Jackman and Pearlman, *Local Government in a Unitary State*, pp 40-42

²⁶ See Willis, *op. cit.*, p401

²⁷ E.g. the Burgh Police (Scotland) Act 1833

²⁸ E.g. the Towns Improvements Clauses Act 1847

provide some public goods²⁹. The shift to using public general Acts to impose some duties regarding the provision of public goods in the field of public health, regarding, for example, sanitation, began in the mid-nineteenth century³⁰, with Parliament becoming increasingly active in this field during the last quarter of the century³¹

The second category of services to be considered are the redistributive services provided by local authorities during this era. The most obvious of these services was the provision of poor relief, a function which local authorities had performed for centuries, the provision of which was reformed by the Poor Law Amendment Act 1834, and continued until well into the twentieth century. Other examples are education, which progressively assumed greater importance after the Elementary Education Act 1870 was passed, the provision of hospitals and medical care (which was not always universal, and was in some instances linked to the provision of poor relief), and, from the last decade of the nineteenth century, and particularly after World War One, the provision of public housing. The provision of these services was generally aimed at benefiting members of the working class who could not afford to purchase these services from a private sector which was either unable or unwilling to provide an adequate standard of service to a broad section of the populace.

What is noticeable about most of these services is that private legislation, clauses and adoptive Acts played very little part in their provision. Provision of assistance under the Poor Laws and the provision of elementary education were rooted in legislation which not only endowed local authorities with certain powers, but also imposed important duties. In relation to housing the Housing of the Working Classes Act 1890 gave local authorities powers to close houses which were insanitary, pursue slum clearance schemes, and to build accommodation for the working classes where there was an

²⁹ See Maud, *Local Government in Modern England*, p214.

³⁰ Public Health Act 1848

³¹ See e.g. Public Health Acts 1872 and 1875, and the Public Health Amendment Act 1890. For a fuller commentary on the progress of public health legislation see Clarke, *History of Local Government of the United Kingdom*, Chapter XII

insufficient supply of it. These powers were supplemented over the next forty-five years³². Redistributive services relied heavily upon public general Acts for their authority, in spite of the assertion that as late as 1935 the common means by which the powers of local authorities were extended was by means of private legislation³³.

The final category to be considered is trading services. To a greater or lesser degree local authorities have engaged in trading activities for centuries, carrying on everything from the operation of markets and airports, to the maintenance of municipal banks³⁴. However, during the period in question many authorities acquired the power to run public transport, and public utility undertakings such as gas, electricity and water. J.P.R. Maud succinctly stated the reasons why these functions were ascribed to local authorities:

" ... it is generally true to say that when a service is such (a) that the undertaker must have special powers of overriding private interests, or (b) that its provision is closely bound up with some activity for which the local authority is already responsible, or (c) that it is most economically run as a monopoly (and the consumer therefore needs special protection from abuse), or (d) that it will not be undertaken by private enterprise for profit, or (e) that it is connected with some piece of property belonging to the citizens at large or with a peculiar local amenity, then the local authority if (sic) often allowed by Parliament to provide the service."³⁵

The fact that local authorities possessed powers to pursue such activities was always the source of some controversy, with debate on the scope and management of municipal utilities intensifying after World War One³⁶. Nevertheless it is true to say that in the case of gas, water and electricity there was a strong tendency to local monopoly and that attempts to maintain competition in the mid-

³²For a fuller explanation of the development of public sector housing legislation see Clarke, *op. cit.* Chapter XIII. See also Simon, *Housing and Civic Planning*, in Laski et al, *A Century of Municipal Progress*

³³ See fn. 17, *supra*

³⁴ See Clarke, *op. cit.*, Chapter 17; Harris, *Municipal Self-Government in Britain* Chapter 10

³⁵ Maud, *Local Government in Modern England*, p 41

³⁶ See e.g. Summer Conference of the Institute of Public Administration on *Administration of the Public Utilities* [1926] 4 *Public Administration* 281; Mackenzie, *Municipal Trading* [1927] 5 *Public Administration* 244; Conference on the Management of Public Undertakings [1929] 7 *Public Administration* 103

1850s had been counter productive, as private sector undertakings were quite often inefficient, or formed price-fixing cartels, or caused such disruption to local life in laying necessary pipes that Parliament and public opinion became more kindly disposed to monopoly, and to municipal ownership³⁷. However, it was not the case that all local authorities acquired trading functions: in 1933, for example, of 656 gas undertakings, only 247 were operated by local authorities³⁸, while local authorities supplied only eighty per cent of the nation's water³⁹ and two thirds of the nation's electricity supplies⁴⁰

Local authorities most commonly acquired the power to conduct trading undertakings by virtue of private Acts of Parliament⁴¹, although clauses or adoptive Acts could also be used⁴². However, public general Acts also played a part, as is illustrated by the Public Health Act 1848 which empowered local Boards of Health to provide a water supply where no private undertaking existed.

Having examined briefly the functions which local authorities acquired during this era, one must now pose the question: by what means were these functions performed? Given the nature of some of the functions acquired by local authorities during this era it is perhaps inevitable that the number of local authority employees should expand. As the involvement of authorities in education expanded, for example, more teachers would have to be employed. Similarly, as local authorities assumed powers to provide utilities, and run public services, the number of employees would also expand. In the case of utilities this was inevitable, given that monopoly undertakings were generally established in response to the failure of the market to provide an efficient service: in such circumstances contracting with the private sector was not an option.

³⁷ See Robson, *The Public Utility Services*, in *A Century of Municipal Progress*, at pp 304-7, discussing gas undertakings

³⁸ *Ibid.* at p309

³⁹ *Ibid.*, p319

⁴⁰ *ibid.* p326

⁴¹ Manchester, for example, acquired approval for the maintenance of its gasworks by a private Act of 1824

⁴² E.g. Tramways Act 1870

However, in many cases it was open to authorities either to employ their own workforce, or to engage contractors. An example of this situation is to be found in the Burgh Police (Scotland) Act 1833, which not only addressed policing functions, but also matters such as street lighting, paving, refuse collection, street cleaning and the provision of drainage. Section 45 stated that police commissioners were "authorised to contract with any person for carrying into execution any of the operations herein authorised". This discretion either to employ their own workforce or to engage contractors was emphasised by S111, relating to refuse collection, which declared that Commissioners:

"...may appoint Scavengers, and others for sweeping and cleansing the Streets ... or contract with any person for these Purposes..."

Thus local authorities which expanded their workforce were often taking a positive decision to exercise their discretion in relation to a given function which led to that result. However, in respect of many functions it is apparent that local authorities were reluctant to expand their workforces. It was not until 1893 that the first direct labour organisation was formed by West Ham, to deal with their housing and building programmes. Other authorities later followed suit. It would therefore appear that authorities, until the late-nineteenth century, very often contracted with the private sector for the performance of many of their functions.

As local authorities, particularly during the first half of this period, contracted out the performance of many of their functions, it is perhaps inevitable that many such contracts would be awarded following a tendering process: this had been the standard method of awarding contracts in the preceding era, and there is no reason to infer that it was not the procedure followed during the period in question. In addition, towards the end of this period, competitive tendering was given statutory recognition. Section 266 of the Local Government Act 1933 compelled authorities to adopt standing orders for competitive tendering for "the supply of goods or the execution of works". However, while the adoption of such standing orders was obligatory, adherence to them was not: the standing orders could be

set aside in "special circumstances", a term which was left undefined, and a failure to comply with the orders would not affect the validity of any contract entered into.

By the end of the 1930s the functions, and the workforce, of local authorities had expanded to an extent which would have been unthinkable little over a century before. However, throughout this period local government had always possessed the discretion to contract with the private sector for the performance of its functions, and had often done so, thus illustrating that there was no presumption that the functions of local authorities should automatically be performed by direct labour. Once more, after 1945, there would be great changes in the range of functions performed by local government, and in the manner in which they were performed.

Developments in Service Provision 1945- late 1970s

This was a period which also witnessed extensive restructuring of local government in both England and Scotland⁴³. However, significant changes had taken place prior to reorganisation. Chief amongst these was the removal from local authorities of many of their functions in the redistribution of responsibilities between central and local government in the years after 1945. With the advent of the welfare state local authorities lost their role in administering unemployment and related benefits, and their role in provision of health services by the National Health Services Act 1946. In addition, the supply of gas and electricity was nationalised. Of the other trading functions, the provision of public transport, primarily buses, remained in local authority hands, while those English authorities which supplied water were stripped of that function in 1974.

However, while local government may have lost responsibility for these services, the sphere of local authority activity actually expanded during this period. It has been commented that authorities:

⁴³ Local Government Act 1972, London Government Act 1963; Local Government (Scotland) Act 1973

"... have both retained and assumed responsibility for many services which have grown in importance with the establishment of the welfare state; especially education, housing and personal social services ... Local government is now largely concerned with the provision of redistributive services; in 1975, for example, 65 per cent of local expenditure was devoted to redistributive services"⁴⁴

The redistribution of functions between central and local government therefore left local government with no less influence than it had previously held. How did local government perform the functions it did possess, however?

There is some evidence that, in the late 1950s, due to difficulties in recruiting sufficient staff to perform their functions, local authorities engaged private contractors to fulfil some of their requirements. However:

"Records from this period are patchy ... and most of the firms which held these contracts have long been out of business; as a result, the total value of 'privatised' work is not known."⁴⁵

The example given of this phenomenon is the provision of refuse collection, contracts for which were most common in the South-East⁴⁶. It is not discussed whether the contracts were negotiated, or if a tendering process was used.

In certain respects it is unnecessary to concern ourselves unduly with the methods utilised in the 1950s, as:

"In the 1960s, contractual work in local authorities dried up, possibly as a result of the more fluid employment situation."⁴⁷

Just as the near full employment of the 1950s had rendered it impossible for some local authorities to recruit or maintain staff, thus forcing their reliance on contractors, the rise in unemployment in the 1960s removed local authorities' staffing problems, thus obviating the need to retain contractors, and resulting in a decline in

⁴⁴ Loughlin, *Local Government in the Modern State*, p6

⁴⁵ Ascher, *Politics of Privatisation*, p23

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

contracting out. There was a massive expansion of the local authority workforce from 1,800,000 in 1960 to three million in 1975- a rise in the order of sixty-six per cent. In such circumstances, with the tendency to resort to in-house performance of functions, neither contracting out or competitive tendering was a live issue, except in relation to construction projects, where it remained the norm

If the period from the 1830s to the 1940s had witnessed the functional expansion of local government, the factor which distinguished the era between 1945 and the late 1970s was the growth of the local authority workforce, and the increasing performance of work in-house: prior to this there had been no assumption that work should be performed in-house, and even in the 1950s contractors had been engaged by local authorities to perform services in cases of necessity. However, by the late 1970s, with public expenditure spiralling, and increasing concern about the efficiency of direct labour organisations, the ideological debate began on how to improve the efficient running of local authorities.

CHAPTER 2

1975-80: BROAD CONSENSUS EXISTS ON THE FUTURE OF DIRECT LABOUR ORGANISATIONS

The political debate on the performance of work in-house by local authority direct labour organisations (DLOs) can be traced to the mid-1970s. In 1975 the Chartered Institute of Public Finance and Accountancy published a report entitled *Direct Works Undertakings Accounting*¹. This was the report of a CIPFA working group charged with examining the accounting practices of direct labour organisations, and the means by which performance could be measured against financial results, and was divided into two parts. Part I amounted to a manual of accounting practice, but Part II examined the principles of accounting and management which the working party believed needed to be debated. This Part of the report proposed three principal changes to the way in which DLOs operated: they should be run as trading organisations; the vast majority of major works contracts should be tendered for; and charges to accounts should be based on the valuation of work, not on the work carried out. It was felt that if these proposals were adopted, the accounts of DLOs could give an accurate annual illustration of their performance which would facilitate clear and fair comparison with similar entities.

The CIPFA report was the catalyst for the debate on the future of building and works DLOs which was to continue for the next five years. Within five months the Labour Government of the day had established a departmental working group charged with investigating the organisation and operation of DLOs², and considering the recommendations contained in the CIPFA report. At this relatively early stage Ministers were already convinced that:

"The efficiency of direct labour departments should be tested in competition with private contractors."³

¹ See also *Direct Works Undertakings Accounting*, [1975] 2 Public Finance and Accountancy 235

² Announcement by Minister of Housing and Construction, 14/10/75

³ Under-Secretary of State for the Environment, 1974-5 HC Debs Vol 897 col 1338

In fact, the majority of new construction work was awarded following a tendering procedure, and the Department of the Environment endeavoured to ensure that work was awarded to DLOs following competition with the private sector⁴. However the fact is that no legislation existed at that time to ensure that work was awarded to DLOs on a competitive basis. Consequently there were a few well-publicised cases of DLOs performing work so inefficiently that massive cost overruns resulted, the burden of which was passed on to local ratepayers or central government. Prime examples of this situation were the construction of the Darnley housing scheme in Glasgow, which resulted in £2.2m of losses having to be written off, and the loss of £1m over two years by Wandsworth's DLO, in spite of forecasts that it would break even. In an era of poor economic performance, when the expenditure on direct works was around £1500m, the fact that the majority of local authority construction (if not maintenance) work was awarded competitively mattered little: the potential for abuse of the arrangements which existed regarding the award of work, and for enormous cost overruns, was obvious and needed to be addressed.

While the Departmental working group continued its deliberations, the Labour government had, by late 1976 committed itself "among other things, to establish a financial objective supported by charging, tendering and accounting requirements for the future operation of direct labour organisations"⁵. In spite of this commitment, and the undertaking given by the Minister for Housing and Construction in July 1977 that these matters would be dealt with "when we have the opportunity for comprehensive legislation on local authority direct labour organisations"⁶ no legislation was introduced by the Callaghan administration. Moreover, in spite of the early recognition of the necessity of legislation, and the fact that the content of any legislation was identified at an early stage, the Departmental working group appointed in October 1975 did not report until August 1978.

⁴ See HC Debs Vol 897 col 1339

⁵ See 1976-7 HC Debs Vol 919 col 342w. See also 1976-7 HC Debs Vol 921 cols 42-3w. On the establishment of separate accounts for DLOs see 1976-7 HC Debs Vol 922 col 719w

⁶ 1976-7 HC Debs Vol 936 col 607

It is not surprising, considering the Labour government's protracted period of inaction, that the Conservative opposition should attempt to seize the legislative initiative. The first attempt was the Direct Labour (Restriction of Works) Bill introduced under the ten minute rule late in the 1977-8 session of Parliament. This Bill sought to preclude DLOs from performing any new construction work, to ensure that most other work over £5000 should be tendered for, and to provide that DLOs should be treated as trading services in accordance with the CIPFA proposals. The Bill was clearly very restrictive, and was defeated by 212 votes to 198.

The second attempt, the Direct Labour (Major Construction Works) Accounting Bill, which was only intended to apply to England and Wales, was introduced in mid-February 1979, and received its second reading on 27th March. This Bill sought to ensure that DLOs only performed work for their parent authorities, or within the ambit of the Local Authorities (Goods and Services) Act 1970 and that they should be trading organisations required to compete for eighty per cent of the work performed in each financial year. The Bill also prescribed the accounting regime. Significantly, however, while works of "construction, adaptation and renewal" of "public buildings" was expressly covered by the Bill, works of general maintenance were not.

The Bill's promoter, Lord Kinnoull, accepted that the vast majority of DLOs were "very efficient units which give an extremely good service to ratepayers and represent good value for money"⁷: it was only the performance of a few which gave cause for concern, because the legal and accounting regime within which they operated neither required them to think, or to act, like trading undertakings⁸. Both the Opposition and Government were agreed on the principles underlying the Bill, namely the improvement of DLO efficiency via the imposition of tendering procedures and the adoption of an improved accounting regime⁹. However, the Government pointed out

⁷ 27/3/79 HL Debs col 1497

⁸ Ibid. cols 1497-8

⁹ See Baroness Stedman, *ibid.* cols 1517-8

two serious flaws in the scheme of the proposed legislation: it proceeded on the erroneous assumption that DLOs possessed legal personality distinct from their parent authorities, and the Bill was too limited in scope, as it was primarily concerned with accounting procedures, and only with construction works, not maintenance¹⁰. It was therefore pointed out that the Government would introduce a Bill with the same objectives, but of greater scope, as soon as possible¹¹. While the Bill was sent to Committee, it fell on prorogation.

The 1979 election manifestos did not directly address DLO efficiency. Labour, seeing an efficient construction industry as essential to its economic and social aims, dealt with the issue under the heading of "Building and our Future"¹². It implicitly accepted that DLOs had to be run as trading undertakings forced to tender for their work and subject to new rules governing their accounts. This was accompanied by an almost incongruous commitment to expand DLOs, although this was not a new policy¹³. The Conservative manifesto dealt with the issue in the wider context of general governmental inefficiency and overspending, and the problem of "over-government", under the heading of "Better value for money":

"The reduction of waste, bureaucracy and over-government will yield substantial savings ... By comparison with private industry, local direct labour schemes waste an estimated £400m a year."¹⁴

When it came to power in May 1979 the Conservative government was thus determined to tackle the issue of DLO inefficiency legislatively.

¹⁰ Ibid., col 1519

¹¹ Ibid., col 1523-4

¹² See The Labour way is the better way. The Labour Party Manifesto 1979 pp 20-1

¹³ See e.g. 15/10/75 HC Debs Vol 897 col 1339; 3/7/78 HC Debs Vol 953 col 78w

¹⁴ Conservative Manifesto 1979: Restoring the balance

The passage of the 1980 Act through Parliament

The election of the Conservative government in 1979 resulted in many radical changes in policy, particularly in relation to local government. The Local Government, Planning and Land Bill, when introduced in early 1980, was almost universally criticised as being six or seven important Bills wrapped into one. In the midst of provisions relating to planning applications, the administration of the Rate Support Grant, the establishment of Urban Development Corporations, and controls of local authority capital expenditure, Part III sought to establish compulsory competitive tendering (CCT) for construction, maintenance, and highway work, and to regulate the activities of local authorities' DLOs.

Part III can be viewed in the context of the other parts of the Bill, many of which, such as the provisions regarding capital expenditure, addressed financial issues, while others, such as the provisions of Part X¹⁵, which regulates local authorities' land holdings, may be viewed as emanations of the Conservative belief that the role of the public sector and scope of public ownership should be limited. The Secretary of State for the Environment expressed the objective of the CCT provisions contained in Part III as:

"...simply to cut waste and inefficiency. Authorities will have to put their DLO accounts on a sound footing, closely comparable with a commercial undertaking. Unless they can do this they would be better employed using their assets in a more productive area elsewhere"¹⁶

This indicates that CCT for highway, construction and maintenance work represents one strand of one of the common threads running through the 1980 Act: the more efficient use by local government of its financial resources and physical assets. The tendering regime proposed in the Bill¹⁷, predicated on the pursuit of greater value for money, could contribute to controlling the cost of local authority

¹⁵ Enacted as SS 93-99

¹⁶ 1979-80 HC Debs Vol 978, col 272

¹⁷ The regime contained in the 1980 Act will be discussed briefly below

highway, construction and maintenance work, while the accounting regime would ensure accountability, and greater responsibility, for DLOs by illustrating their performance and pointing out situations where DLO costs had exceeded initial valuation of the work.

In comparison with the other parts of the Bill, the passage of Part III of the Local Government, Planning and Land Bill was relatively uncontroversial. While concern was expressed by the Opposition in the course of debates on the bureaucratic costs of tendering and the expansion of white collar services to cope with the tendering process, the effect that CCT would have on the role of local authorities as model employers, and the prospect of generally efficient DLOs being replaced by corrupt or incompetent contractors, it was conceded that there was a need to require all DLOs to be run efficiently, although most were in fact run efficiently, and won most of their major work in competition with the private sector¹⁸.

Proceedings in Standing Committee provide some insight into the tenor of the debate during the Bill's passage through the Commons. One Labour Member of the Committee expressed concern that proceedings were:

"...so reasonable. We are making suggestions and they are being accepted." ¹⁹

There was considerable give and take in Committee, with matters such as the distinction between functional work and works contracts, much of the accounting regime, the rates of return on capital employed, annual reports, most of the Secretary of State's powers, and the consequential repeal of other legislation, were disposed of with little or no discussion. Most debate centred on the regulation of functional work. The issue of what constituted "fair competition" may have been the issue which separated the parties²⁰, but some significance may be attached to the fact that

¹⁸ See e.g. Roy Hattersley, 1979-80 HC Debs Vol 978 col 272

¹⁹ Mr. Cant, Standing Committee D, col 203

²⁰ See e.g. Cant, *ibid.*, col 203; Litherland, cols 194, 222; Graham, col 239. Concerns had already been expressed during the second reading debate: see e.g. Douglass-Mann, 1979-80 HC Debs Vol 978 col 254

the majority of matters raised in Committee were settled by agreement, rather than forcing a division. Debate centred, as it should have, upon practical matters rather than issues of ideology, although members often tried to represent localised interests: only rarely were attacks made on the imposition of market-based techniques and the philosophy underlying them²¹. To counter such criticisms the Government pointed out that it was not intent on "murdering" DLOs, but only wished to impose greater discipline upon them necessitated by the expanded role they had assumed over time²². Taking this assertion at face value one can accept that, like the legislation mooted by the previous Labour government, the Conservative administration's proposals were compatible with the CIPFA report's recommendations. Moreover, given that a government Minister declared in Committee that he neither viewed the private sector as being perfect, nor all DLOs as imperfect²³, one can accept that debate was not as doctrinally entrenched as it would become during the course of the 1980s, the gap between Government and Opposition not being as wide as one would expect as a matter of course later in the decade.

Subsequent consideration of the Bill by the Commons followed a similar pattern. A considerable degree of consensus prevailed, with the majority of amendments being either accepted or withdrawn, and most clauses being dealt with almost summarily, although there was some concern that the Secretary of State's powers to sanction local authorities for poor DLO performance, including closure orders, represented a negation of local democracy, as local authorities could thus be deprived of making certain choices as to service provision. However, in spite of cracks appearing in the consensus, Labour politicians still conceded that there was "room for improvement" of DLOs' performance²⁴, while the government could counter suggestions that the Bill was an attack on DLOs by cogently pointing out that it had been the intention of the Labour government to introduce measures to address the same issue²⁵

²¹ See e.g. Cant, *ibid.*, cols 227-230

²² Fox, *ibid.*, cols 244-5

²³ Fox, *ibid.*, col 260

²⁴ See Heffer, 1979-80 HC Debs 987 col 1892

²⁵ 1979-80 HC Debs Vol 987, col 1912

In the Lords the Bill was again presented as being designed to implement the CIPFA report and reduce local government inefficiency. However, the gap between the parties was wider on several issues: although the essential principle of improving DLO efficiency was accepted, there was increasing fear that the Bill's provisions would prove to be a negation of local democracy.

The passage of Part III of the Local Government, Planning and Land Act 1980 thus presents a curious situation: while ideological differences between Government and Opposition were generally becoming more pointed, a broad consensus existed regarding the problems of local authority DLOs, and the way in which they could be tackled. While differences did emerge on particular issues, it must be remembered that in any era, in any particular legislative situation, differences will exist between party groups on the particulars of legislation. Setting aside the inevitable differences on particular provisions, and focusing on the wider picture, one may ascribe the broad consensus which existed to genuine fears about DLO performance expressed over a considerable period, and common acceptance by both Labour and Conservative Governments of the recommendations made in the CIPFA report of 1975 as the basis of legislative proposals. As a result, Part III of the 1980 Act, and the debate surrounding its passage, were hangovers from the mid-1970s era of consensus politics.

The provisions of Part III of the Local Government, Planning and Land Act 1980 itself were relatively limited in scope. The Act only applied to "works of construction and maintenance"²⁶, which was defined as:

"building or engineering work involved in the construction, improvement, maintenance or repair of buildings and other structures or in the laying out, construction, maintenance or repair of highways and other land..."²⁷

²⁶ See S5(1)(c); S8(1)

²⁷ S20(1). However, S20(2) contains exceptions relating to parks, gardens, playing fields, open spaces, and allotments, and for work which is essentially carried out by janitors and caretakers, while S20(3) excepts work relating to docks and harbours.

The limited scope of the 1980 Act was emphasised by the fact that, while the Secretary of State was given powers to issue regulations regarding specific descriptions of construction and maintenance work²⁸, it contained no mechanism for the extension of compulsory competitive tendering to local authority services. The fact that the 1980 Act contained no such mechanism was a significant omission: had it existed it is conceivable that the Government would have availed itself of the opportunity to extend CCT to local authority services some considerable time before it did so by means of the Local Government Act 1988, probably around 1985, when it indicated its intention to bring a variety of services within the ambit of CCT²⁹.

The 1980 Act established two tendering regimes³⁰: the works contract regime, which essentially provided that an authority could not perform work for another local authority unless it had been awarded a contract following the submission of a tender in a situation after the authority and three other potential contractors had been invited to submit tenders³¹, and the functional work regime. The functional work regime basically provided that, where an authority wishes to perform construction and maintenance work via its Direct Labour Organisation it must prepare a written statement of the amount which it intends to credit to the DLO revenue account in relation to that work, and the means by which that sum will be calculated (this is essentially the DLO tender), and prior to performing the work via its DLO an authority must invite at least three other persons contained on a list of approved contractors to submit tenders³². The tendering regimes established by the 1980 Act lacked sophistication. First, the tendering regimes only apply where local authorities wish to perform work via their own, or another

²⁸ See e.g. 9(3)(a)

²⁹ See chapter 4 on the adoption of the policy of compelling competitive tendering for services

³⁰ These did not apply, however, to small direct labour organisations which had employed less than thirty people in the previous year: S21

³¹ See S7

³² See S9

local authority's DLO. Moreover, the functional work regime only required the invitation of tenders from three persons contained on a list of approved contractors maintained by a local authority: neither the possibility of inviting tenders after the publication of a tender notice, and the notification of interest by approved contractors, nor the circumstances in which contractors would be admitted to lists of approved contractors, were addressed in the statute. Finally, the provisions regarding the content of the DLO tender were fairly rudimentary.

If the scope of the 1980 Act was limited, and the tendering regimes were fairly rudimentary, the provisions relating to the maintenance of accounts and the Secretary of State's powers of sanction were more substantial. Authorities were required to maintain detailed annual accounts of all construction and maintenance work which they performed³³, although DLOs employing less than thirty persons were exempt³⁴. Authorities were prohibited from crediting to the DLO account an amount in excess of the sum contained in the DLO bid³⁵, or calculated in accordance with any variation envisaged in the DLO bid³⁶. Authorities were required to produce a balance sheet, revenue account and statement of rate of return by 30th of September each year³⁷. Complementing this is the duty to prepare annual reports for public inspection³⁸. The Secretary of State was endowed with substantial powers to regulate the accounting regime further³⁹. The statement of rate of return on capital employed must show that the DLO has complied with the duty imposed by S16 to show such positive rate of return on capital employed as the Secretary of State may specify⁴⁰. Local authorities were placed under a duty to inform the Secretary of State of their failure to meet the specified rate of return, and if they failed to perform that duty in three consecutive financial

³³ S10

³⁴ S11

³⁵ S12(1), (2), (3)

³⁶ S12(4)

³⁷ S13

³⁸ S18

³⁹ See e.g. S10(4), S11(3), S12(5)

⁴⁰ S13(6)

years there was a procedure which permitted the Secretary of State to impose sanctions on an authority, including the closure of the DLO⁴¹. While the accounting regime was highly detailed, it is notable that the powers of sanction contained in S17 only applied to a failure to meet the rate of return on capital employed specified by the Secretary of State. Significantly, the Secretary of State possessed no powers to impose sanctions on local authorities for failure to comply with the requirements of the tendering regimes.

While broad consensus may have existed regarding the problems of building and works DLOs, attention was now focused on local authority service provision in general. The importance of ideological beliefs would become more pointed during the debate on the extension of competitive tendering and contracting out to local authority services.

⁴¹ S17

CHAPTER 3:

"Our policy is ...": From encouragement of contracting out to frustration at authorities' failure to do so, 1980-5

A new government, a new outlook: the Thatcher administration and the New Right

In spite of the broad consensus evident during the passage of the Local Government, Planning and Land Act 1980, the Thatcher administration, on coming to power in 1979, espoused policies which represented a departure from many of the assumptions of post-war politics. Collectivist notions were little respected and, as was evident from the Conservative's 1979 election manifesto¹, there existed clear dissatisfaction with the scope and role of the state. Such dissatisfaction reflected the ideal of the New Right, characterised as being the free economy and the strong state². The minimalist state is the preferred option of the New Right. It was accepted that in achieving a reduction in the size and scope of the state it would prove necessary to have "strong government", as a variety of interests would have to be confronted, most notably public sector professionals and the trade unions representing those working in central and local government and the nationalised industries. In order to tackle the problem of over-government, resolute action would be required of those at the heart of the decision-making process. At a practical level, any government possessing a workable majority in the House of Commons, and the ability to control its MPs, will be "strong" enough to pursue the policies necessary to give effect to a reduction in the size and scope of the state. The sizeable majorities possessed by successive Conservative Governments during the 1980s ensured that there were few difficulties in giving legislative effect to their policies regarding denationalisation and local authorities. Changes in the scope and role of the civil service could be effected by exercising prerogative powers: legislation was the exception, not the rule. In view of the civil service's different legal basis the essential requirement for effecting changes has generally proved to be the

¹ Restoring the Balance: the Conservative Manifesto 1979

² See generally Gamble, *The Free Economy and the Strong State* (2nd Ed. 1994)

political resolve to impose such changes in the face of opposition from public sector professionals and trade unions.

If strong government (or the "strong state") in the sense of resolute political administration and minimal governmental institutions is one element of the New Right ideal, its counterpart, the free economy, is no less important in understanding the policies which have been pursued by successive Conservative administrations since 1979. The New Right believes that the free market must ultimately be the arbiter of what is economically sound as the market provides an environment in which only the most efficient economic actors can survive. The New Right thus have considered a large public sector as being at variance with their fundamental economic principles, because:

"The existence of a substantial sector where services were provided by public bodies meant a large area where administrative rather than market criteria held sway. New Right economists endeavoured to show that market solutions would in every case be superior to the established public provision, and that there were very few goods that could not be supplied through markets. ... The argument was that good intentions and high ideals were not enough. Any service would be more efficiently provided if it was subject to competitive tender and free from administrative controls and political interference. Another crucial argument was that any system of administrative rationing necessarily conferred privileges on those groups best able to lobby the bureaucracy. ... If services were provided through markets then not only would there be less waste and inefficiency, there would also be greater choice."³

Thus, according to New Right theorists, the market provides a naturally superior mechanism for making choices about the delivery of services. While nationalised industries transferred to the private sector would be subjected to the rigours of the market (in theory if not always in practice), the services provided by central and local government, not being subject to the competitive forces of the market, and operated by self-interested bureaucrats within policy frameworks set by politicians pursuing their own policy goals, could remain havens of waste and inefficiency. By pursuing a market-based approach to service delivery efficiency could be improved and

³ Ibid. pp 56-7

costs reduced⁴, with a simultaneous de-bureaucratisation and de-politicisation of service delivery, and increased customer choice. The innately superior market could remedy the public sector's many inherent deficiencies.

While the free economy and the strong state may represent the ideal of the New Right, the Conservative party in Britain has tempered this with its perception of itself as "the party of government". The pursuit of the ideal must be subordinated to the political expediency of the pursuit of power. Some contend that the pursuit of power, the existence of conviction politics, and the possibility that events may occur which are beyond the control of government (for example the stock market crisis of October 1987 and the exchange rate crisis of September 1992) have resulted in the identification of a problem being perceived to exist in certain policies of successive Conservative administrations: a lack of coherence arising from attempts to satisfy the competing interests of the electorate and party ideologues at various times, and to react to world events.

The extent to which there has or has not been a lack of coherence in the policies of Conservative administrations since 1979 regarding competitive tendering for, and the contracting out of, local authority services will be discussed below. However, at a more general level, some attempt has been made to show that these are but two elements of a wider, coherent, policy initiative. To accept that competitive tendering and contracting out form part of a coherent policy initiative, one must first recognise that they are two aspects of privatisation: this is logical, as both are intended to change the balance between the private and public sectors⁵. Once viewed in the wider context of privatisation, it can be argued that competitive tendering and contracting out form part of a coherent policy. Privatisation, however, can only be viewed as a coherent policy if it is analysed in political rather than economic terms, in view of the lack of consistency and coherence in the economic justifications

⁴ See for an example of this argument Michael Forsyth, *Reservicing Britain*, Adam Smith Institute (1981)

⁵ See Young, *The Nature of Privatisation in Britain, 1979-85*, (1986) 9 *West European Politics* 235

expressed by ministers for privatisation, and the emphasis placed on short term measures such as reduction of the public sector borrowing requirement when determining whether to privatise nationalised industries⁶. Therefore, in order to accept that privatisation has represented a coherent policy, it must be considered in purely political terms: it has thus been argued that privatisation was intended to be a means of maximising political power by, in effect, creating a wider body of voters who identified with the Conservative Party⁷. Following this analysis, one may assert that, at a broad conceptual level, potential tensions between the New Right agenda, and the pursuit of power can be reconciled quite simply: by altering the balance between the public and private sectors, which is an essential part of the New Right agenda, the Party's pursuit of power is assisted by creating a larger body of electors who may potentially identify with the Conservative Party.

However, one should bear in mind that the argument that a coherent policy exists is dependent on an examination of a variety of policies at a broad conceptual level. At a more specific level one must ask: to what extent have the ideals of the New Right been pursued by Conservative governments in relation to local government services? Moreover, has there been a lack of coherence in the policies pursued regarding competitive tendering and contracting out? An examination of the development of government policies on local authority service provision may shed some light on the issue.

"Our policy is to encourage...": encouragement of contracting out 1980-83

The most notable aspect of initiatives regarding competitive tendering for, or contracting out of, local authority services in the early 1980s is the small part which central government played in their formulation. In the years immediately following the passage of

⁶ See Graham and Prosser, *Privatising Nationalised Industries: Constitutional Issues and New Legal Techniques* [1987] 50 MLR 16; Heald and Steel, *Privatising Public Enterprise: An Analysis of the Government's Case* [1982] 53 Political Quarterly 333

⁷ See Dobek, *Privatisation as a Political Priority: The British Experience*, (1993) XLI political Studies 24

the Local Government, Planning and Land Act 1980 the most active participants in the debate on the future of local authority service provision were members of certain Conservative-controlled local authorities who were convinced of the efficacy of "privatisation" of service delivery, and those members of New Right think tanks who contributed the ideological dimension to the debate⁸.

The impetus to contract out services initially came from within local government itself. While contracting with the private sector was by no means a new or novel idea, local authorities almost invariably chose to provide services in-house. In the case of refuse collection, for example, in 1979 only two English local authorities engaged private contractors to perform the service⁹. Following the winter of discontent of 1978-9, during which some authorities had used contractors on an ad hoc basis to clear refuse from the streets, some authorities began to challenge the assumption that services must be provided in-house. The first council to take positive steps to explore alternative means of service provision was Southend, a Conservative-controlled authority with a history of poor industrial relations and an increasing sense of frustration at the working practices of its direct services organisation. After investigating the possibilities of competitive tendering in the face of considerable union opposition Southend eventually awarded a contract to Exclusive Cleaning which undercut the in-house bid by almost £500,000¹⁰.

The attractions of competitive tendering and contracting out thereafter became apparent to an increasing, although relatively small, number of local authorities, most significantly the London Borough of Wandsworth, which was to become the most high profile proponent of contracting out. Its resolve to subject to competition an increasing range of services such as street cleaning, refuse collection, ground and vehicle maintenance, building cleaning,

⁸ It is interesting to note, however, that some privatising councillors disclaimed that they were pursuing an ideological end, but merely improving efficiency for its own sake: see Coombs, *Privatisation- the Birmingham experience*, (1983) 9(2) *Local Government Studies* 9

⁹ The two authorities in question were Maldon and Mid-Bedfordshire: see Ascher, *Politics of Privatisation*, p217

¹⁰ See Ascher, *op. cit.* pp 33-4

housing caretaking and the cleaning of public conveniences over a short period of time was remarkable. While threats of strike action regarding the council's proposals for street cleaning¹¹, and Wandsworth's counter-threat of legal action¹², were amicably resolved¹³, the acrimony surrounding Wandsworth's plans for refuse collection was almost legendary¹⁴, involving rallies opposing the contracting out of this service¹⁵, a lengthy strike¹⁶, and attacks on the dust-carts of private contractors¹⁷. However, support for the industrial action waned after the local elections returned the Conservatives to power in Wandsworth, forcing a settlement of the dispute. The council's Conservative leadership then pressed ahead with its plans to conduct a tendering process, and awarded the refuse collection contract to Grand Metropolitan in July 1982.

By 1983 the activities of Southend and Wandsworth had stimulated interest in "privatisation" amongst other local authorities. A survey in that year revealed that, between April 1982 and April 1983, 150 of the 314 councils in England and Wales which had replied had considered privatisation of one or more services¹⁸. Of those who had considered the option only 9 were Labour controlled. Moreover, while 26 councils had awarded contracts to the private sector, 79 of the authorities which had considered privatisation as an option had retained services in-house without submitting them to competitive tender. The contracts awarded to the private sector during the period in question were not large: only eight authorities had awarded contracts worth in excess of £100,000, while supplementary sources suggest that in the period from 1981 to 1983 only eleven authorities awarded contracts worth in excess of £50,000¹⁹. The twenty-six contracts noted in the Local Government Chronicle survey represented a total saving of in excess of £4.5 million over

¹¹ See FT 4/9/81 p8

¹² See FT 9/9/81 p32, FT 15/9/81 p11

¹³ See FT 8/10/81 p10

¹⁴ For a fuller examination of Wandsworth's privatisation programme, and opposition to it, see Ascher, *op. cit.* pp 233-240

¹⁵ See FT 11/5/82 p10

¹⁶ See FT 21/5/82 p8

¹⁷ See FT 18/5/82 p10

¹⁸ Local Government Chronicle Privatisation Survey 1982-3, 1983 LGC 655

¹⁹ Ascher, *op. cit.* p222

in-house provision, a figure which was no doubt significant in the context of the contracts in question, but would not be of such a magnitude as to result in a noticeable drop in local government expenditure as a whole. However, the survey does reveal several interesting points.

First, it is noteworthy how rapidly authorities had become aware of the attractions of competitive tendering, and that they were at least willing to consider this politically contentious option as a viable alternative to direct service provision. In 1980-1 only two councils had displayed the political will to break with the norm and embrace competitive tendering and contracting out: in the year prior to April 1983, 150 authorities had either considered, or were considering, what would have been virtually unthinkable three or four years before. Moreover, twenty-six had actually contracted out a service; not in itself a substantial number, although it did indicate that contracting out had gained a significant toe-hold, with six per cent of English and Welsh local authorities having done so. Secondly, as nine Labour-controlled authorities had been willing to consider privatisation as an option, this would indicate that commonly held assumptions about service delivery were being challenged on a wider political basis than one might have expected²⁰. Thirdly, it was already apparent that the threat of privatisation was proving to be the catalyst for changes in direct services organisations which resulted in savings being made²¹.

The fact that competitive tendering and contracting out was proving attractive to authorities begs the question: what are the perceived benefits of competitive tendering?

²⁰ The nine Labour authorities in question had considered extensive privatisation. Thurrock D.C. had considered, but rejected, privatisation of all services, while the service most commonly considered as a candidate for privatisation by the other eight was refuse collection, with catering, ground maintenance and cleaning services also being candidates.

²¹ See 1983 L.G.C. 655

Commentators have identified several major benefits of competitive tendering²². First, as competitive tendering, used properly, periodically exposes the provision of services to competition, costs are forced down and efficiency is maximised. Moreover, as it is generally assumed that there is little incentive to pursue economic efficiency where a service is directly provided, competitive tendering can act as a catalyst to remedy the inefficiencies of in-house teams. Second, regulation of the quality of service becomes more objective: as tender documents should specify the quality and quantity of service to be provided, quality standards are established and can be more effectively policed, with the ultimate sanction being the reallocation of the contract to another contractor if the specified standard is not attained. Third, competitive tendering focuses attention away from the resources used to provide a service towards monitoring the results of using those resources, thus allowing authorities to evaluate whether the resources employed in service delivery are being used efficiently. Fourth, those suppliers of services whose activities are not limited by politically determined boundaries can achieve economies of both scale and scope. Fifth, while those bodies engaging in competitive tendering may make cost savings, the Exchequer will benefit whenever a service is contracted out: direct service organisations pay no taxes, but contractors do. Sixth, it is argued that as private contractors tend to be more innovative and better managed than the public sector, they are more responsive to customer needs. Finally there may be a political advantage arising from the need for DSOs to be run in a more commercial manner which is consistent with the government's policy over the past fifteen years of reducing trade union power:

"The need to compete implies a move away from centralised bargaining on wages and conditions towards local labour market rates. ... it is unlikely that traditional bargaining structures can survive competitive tendering for long."²³

²² See Parker, *The 1988 Local Government Act and Compulsory Competitive Tendering*, 27 *Urban Studies* 653. See also Parker and Hartley, *Competitive Tendering: Issues and Evidence*, [1990] 10(3) *Public Money and Management* 9

²³ See Parker and Hartley, *op. cit.* p13. See also Forsyth, *Down With the Rates*. It would appear, however that this transition has not yet taken place: see *National Bargaining Remains the Norm Says LGMB Survey*, 16-22/9/94

In theory the adoption of competitive tendering may force unions to operate increasingly within the strictures of the market in striking the most advantageous deal for their members in the course of each tendering exercise. If unions are forced to strike local, as opposed to national, agreements, their influence as national players is reduced as the object of pursuing their members' interests can no longer be effectively achieved there²⁴.

One must also accept that there has been considerable opposition to competitive tendering. Those opposed to its use have argued that there are four disadvantages. First, those critical of competitive tendering and contracting out contend that it results in a decline in service quality. However, while it was often the case that in the early-1980s a number of councils had to bring work back in-house, or invoke contractual penalties in response to contractor's inadequate performance²⁵, it is now generally accepted that well-developed monitoring procedures can effectively check any decline in service quality²⁶. Secondly, it is argued that competitive tendering, the negotiation of contracts, and contract monitoring are costly administrative processes, which require the employment of more white collar staff at a time when blue collar staff are losing their jobs. Third, it is argued that, where contractors are engaged, their workforces' terms and conditions of employment are inferior²⁷, and that a high proportion of casual labour is employed. Finally, opponents of competitive tendering often play on the fear of contractors forming cartels, thus resulting in less competition.

Between 1980 and 1983, therefore, contracting out and competitive tendering gained a degree of acceptance among local authorities, although few local authorities were sufficiently convinced of the benefits of market-based techniques actually to

Municipal Journal 5, and the Local Government Management Board, Framework and Flexibility - National Agreements for Local Authority Needs

²⁴ See Ridley, *The Local Right: Enabling not Providing*, p28

²⁵ See Ascher, *Politics of Privatisation*, Ch7 for examples: Wandsworth in particular had to fine several contractors, for example

²⁶ This will be discussed *infra*.

²⁷ The legal relevance of the terms and conditions of contractors' workforces will be discussed *infra*, Part II

apply them to the provision of local services. However, while the benefits of competitive tendering for, and the contracting out of, local authority services may have been made apparent to many authorities more by example than by intellectual argument, theorists did play their part in the debate on their merits. The most significant contribution to the debate on "privatisation" of local authority service provision during this period was the pamphlet published by the Adam Smith Institute entitled "Re-servicing Britain"²⁸. The first lines of the pamphlet are indicative of its general tone:

"Local government services in Britain provide in many ways a microcosm of British industry as a whole, exhibiting on a small scale many of the weaknesses and failings which afflict the national economy."²⁹

The evils which were identified as existing in local government were "a combination of escalating costs and increased manpower levels with declining quality"³⁰. The root of the problem lay in:

"The combination of a protected monopoly position with a claim on tax revenues removes all incentive for efficiency of operation and quality of service."³¹

This analysis presented the public sector as being controlled by, and for, the benefit of the bureaucrats who ran it, and the unions which represented the workforce, at the expense of the public, who paid for each service via rates and taxes. The private sector was, however, viewed as inherently superior:

"It is the need for profit which keeps the private sector alert to customer requirements, and the competition which keeps it both effective and innovative. The public service, having no need to attract custom, no profitability requirements to pare its costs, and no

²⁸ First Edition 1980, second Edition 1981. Its author, Michael Forsyth, was a Westminster City Councillor, and would later become a Conservative MP and Minister.

²⁹ Re-Servicing Britain, 2nd Ed. p1

³⁰ Ibid.

³¹ Ibid.

competition to fear usurping its position, tends to operate in the interests of those who administer it"³²

Local government services were consequently characterised as being "expensive, wasteful, inefficient and inadequate"³³, with councillors either lacking the imagination to pursue alternatives to the status quo, or allowing themselves to follow too readily the advice of officials not to pursue certain policies regarding service provision³⁴.

Forsyth opined that:

"While the adoption of business efficiency methods and charges for services both have a role to play, undoubtedly the greatest potential for improvement in local services lies in the idea of privatisation. ... By 'privatisation' we usually refer to the process by which a local authority service provided by its employees ... is replaced by one contracted for by the authority, but provided by private businesses or, occasionally, by voluntary effort."³⁵

By privatising services, costs could be forced down, and quality and efficiency of service delivery would increase. It should be noted that the role of local authorities envisaged in this analysis is solely that of ensuring that a service is provided: as is obvious from the extensive range of services which Forsyth wished to expose to the rigours of the market³⁶ they are reduced to performing the role of a contracting authority, much akin to the concept of the enabling authority which would emerge later³⁷. In examining the advantages of privatisation, it is said that:

"Most of all, perhaps, is the advantage which accrues from competition. With different firms vying for local government service contracts, the authority can not only pick out

³² Ibid.

³³ Ibid.

³⁴ Ibid., p2

³⁵ Ibid., p3

³⁶ The services mentioned in this work include not only refuse collection (see pp 4-6), but also fire-fighting (see pp 7-9), ambulance cover (see p9) and certain social services (see p10)

³⁷ This concept will be discussed below, chapter 4

the best and most efficient for its citizens, but it has in the performance of each contractor a means of assessing the achievement levels of others."³⁸

The concept of "competition" advocated by Forsyth clearly did not envisage the participation of DLOs in an attempt to prove that they could provide services as efficiently as the private sector. The assumption that the private sector would always provide services more efficiently was at variance not only with the scheme of the Local Government, Planning and Land Act 1980, but also with the practice of those (invariably Conservative) authorities which were then conducting competitive tendering exercises.

There is, however, one potentially serious flaw in the argument put forward in Re-servicing Britain. This lies in the reliance placed on research into the experience of cities in the United States, such as the research which indicated that cities with a population in excess of 50,000 which contracted out refuse collection achieved savings of forty per cent. One may question whether this result could be replicated in the possibly different cultural, geographical and operational circumstances of British local authorities. However, more relevantly, aspersions have subsequently been cast on the validity, accuracy and methodology of research from this era into American experiences with privatisation³⁹

Re-servicing Britain, while it did not actually advocate the form which competition should take, did stimulate debate at a more doctrinaire level, with its recommendations figuring in the ruminations of Government Ministers⁴⁰. What, however, was the policy pursued by central government from 1981 to 1983?

Central government was relatively inactive in the debate on competitive tendering during this period. While Lord Bellwin, as Under-Secretary of State for the Environment, may have agreed with

³⁸ Forsyth, op. cit. p3. See also p10 on the virtues of "contracting out".

³⁹ See for a summary Voytek, Privatising government service delivery: theory, evidence and implications, [1991] 9 Environment and Planning c. Government and Policy 155 at pp 163-5

⁴⁰ See e.g. Why Lord Bellwin says contracting-out is a great opportunity, 1981 Local Government Chronicle 130

Forsyth that "the profit motive promotes efficiency", and that "it is important to examine the scope for the increased involvement of the private sector in the provision of local services"⁴¹, few of his colleagues entered into the debate publicly outside the confines of Parliament. Both Mrs Thatcher and Michael Heseltine were known to be enthusiastic supporters of competition in the supply of local authority services⁴², but generally refrained from making any public contribution to the debate on competitive tendering and contracting-out outwith contributions to Parliamentary debates and answering Parliamentary questions.

The source of most information on government policy at this time was the reply to Parliamentary questions. These questions, almost invariably planted, generally asked the Government to praise the work of authorities such as Southend or Wandsworth, or simply asked the government what its policy was. The classic formulation of the reply to such questions was:

"Our policy continues to be to encourage local authorities to provide services by the most economical and cost effective means available, including the use of private sector contractors where this presents the best option."⁴³

Complementing this were the replies given to questions asking whether the government intended to introduce legislation to compel "privatisation" of local authority services. At this early stage of policy development the possibility of legislation to compel competitive tendering and contracting out was discounted⁴⁴.

Why was a policy of encouragement, rather than compulsion, adopted at this stage? Part of the reason may lie in the report commissioned by the Department of the Environment from Coopers and Lybrand entitled *Service Provision and Pricing in Local Government*, which noted that local politics often interfered with

⁴¹ Ibid.

⁴² See "Birmingham highlights direct labour issue" FT 29/12/82 p5 for information on the views of Mrs Thatcher and Mr Heseltine

⁴³ Mrs Thatcher, 1981-2 HC Debs Vol 26 col 273w. See also Tom King 1981-2 HC Debs Vol 18 col 82w, 1982-3 HC Debs Vol 32 col 473-4w

⁴⁴ See 1981-2 HC Debs Vol 18 col 283, 163w

decisions on service provision, and that a general scepticism existed regarding tendering for services. Deficiencies were also identified in existing tendering procedures. The report suggested that flexibility in service provision could be improved by introducing competitive tendering, but did not give it wholehearted support, concluding that services were best provided by a variety of means⁴⁵. In essence this research noted that competitive tendering and contracting out merited consideration, but that they were not solutions which should be applied as a matter of course.

This report may have sat fairly easily with the publicly stated policy of encouragement of competitive tendering: the report explicitly, and the policy implicitly, accepted that competitive tendering was one of a variety of solutions to local government inefficiency, but not the only solution. However, one must ask: how consistent was the policy of encouraging local authorities to expose services to competition with other aspects of Government policy? In early 1983 the DHSS had issued a draft circular regarding the application of competitive tendering to certain ancillary services, thus indicating the government's commitment to its use. Given that commitment, the relative success of compulsory competitive tendering under the Local Government, Planning and Land Act 1980 (different though the ideological basis for that legislation was), the enthusiasm of the Prime Minister and others for the concept, and the general deterioration of central-local government relations at this time it is difficult to see why the Government did not legislate at this stage. Certainly the supportive nature of backbenchers' questions indicate that it had little to lose politically. Three obvious possibilities exist. The first is that it may have been felt that local government unions were still too powerful to confront at this point, and that the spectre of industrial disruption along the lines of 1978-9 would have been politically counterproductive. Secondly, it may have been felt that regulation of the market-place should be avoided if possible, and that the benefits of competition and the natural superiority of the market should become evident by example rather than imposed by legislation. This was certainly

⁴⁵ See Ascher, *op. cit.* pp 37-8 for a discussion of this report

consistent with the policy of encouragement being pursued at this time. Finally, lack of Parliamentary time may have been a factor, although, given that the provisions of the 1980 Act could have been used as a model, and that the required provisions could have been included in any one of the plethora of Acts relating to local government at this time, this explanation is only credible if initiatives relating to competitive tendering had a low political priority.

In some respects the reasons why a policy of encouragement rather than coercion was adopted are academic as by early 1983 Ministers were

"... anxious that every local authority should test every service to ensure that it is being provided in the most cost-effective way."⁴⁶

Following the 1983 General Election, the Government's attitude would undergo subtle changes.

1983-5: Frustration mounts at the failure of the policy of encouragement

The 1983 Conservative manifesto reflected the policy of encouragement:

"The achievement of many Conservative authorities in saving ratepayers' money by putting services like refuse collection out to tender has played a major part in getting better value for money and significantly reducing the level of rate increases. We shall encourage every possible saving by this policy."⁴⁷

In spite of this commitment, however, the period between mid-1983 and early-1985 was to witness growing frustration expressed by Conservative Ministers and MPs at the failure of the vast majority of local authorities to respond to that encouragement. Consequently there was a restructuring of the balance of responsibilities between central and local government, with the Government, and notably

⁴⁶ See Tom King, 1982-3 HC Debs Vol 37 cols 920-1

⁴⁷ Conservative Manifesto 1983: Law Democracy and the Citizen, p36

some Conservative backbenchers also, realising as time passed that sole responsibility for adding impetus to the adoption of competitive tendering could not be left to local government.

In spite of the result of the 1983 Local Government Chronicle survey which showed that the use of market-based techniques had gained a toe-hold, and that the threat of their use often sufficed to galvanise DSOs into making efficiency improvements, by late-1983 a degree of frustration was becoming evident:

"My Right Hon. Friend has no immediate plans for legislation; but is always ready to consider practical proposals for encouraging the contracting out of local authority services"⁴⁸

The formulation of this answer indicates that the Government accepted that some impetus was being lost by permitting local authorities to set their own timetable for "contracting out" services, and that, while the Government may have wished to see more councils doing so, on a practical level it did not yet see how it could influence their actions more effectively. Otherwise, Ministers continued to encourage the use of competitive tendering and private contractors⁴⁹. By December 1983, as was evident by the reply to a question directed at the Prime Minister, frustration was clearly mounting:

"Too few local authorities have been prepared to put too few services out to competitive tender, despite clear evidence of the savings that have resulted from such action. Progress remains disappointingly slow. We are considering what measures could be taken to speed things up."⁵⁰

The government's sense of frustration at the virtues of competitive tendering not being seized upon by local authorities was no doubt emphasised by the results of the Local Government

⁴⁸ 1983-4 HC Debs Vol 45 col 263w

⁴⁹ See e.g. Jenkin 1983-4 HC Debs Vol 47 col 111w, Waldegrave, HC Debs Vol 49 col 214w

⁵⁰ John Biffen replying on behalf of the PM, 1983-4 HC Debs Vol 50 col 132w

Chronicle Privatisation Survey of 1984⁵¹, which revealed that interest in using the private sector was fading. With an identical response rate to the 1983 survey (69%), it revealed that only 79 councils had privatised services or considered it as an option in 1983-4, compared with 150 in 1982-3. The Local Government Chronicle Survey for 1984-5⁵² would further indicate that while privatisation of service delivery had gained some acceptance, with 39 of the 346 respondents to the survey (including three Labour-controlled authorities) having privatised services, 270 of the respondent authorities had neither privatised services nor considered it as an option. Of those 270, nearly a third were Conservative-controlled, while in large tracts of the country, no privatisation took place⁵³. In some cases privatised services had been returned in-house. It has been commented that:

"Although a majority of local councils considered privatisation of one or more services in the early 1980s, few took it seriously enough to undertake formal competitive tendering exercises and even fewer contracted out." ⁵⁴

To an extent this may miss the point. By 1984-5 the impetus towards competitive tendering may have been slowing down, but equally certain is the fact that the use of contractors to perform services had been accepted as a valid option; something almost unthinkable a decade before. The number of councils resorting to private contractors, though small, was not insignificant. The 76 authorities, roughly one in seven, which had considered competitive tendering, may have indicated that there was hardly overwhelming support for the policy, but neither did they represent an insignificant body of opinion which could easily be ignored. However, while competitive tendering may not have been winning massive support amongst local authorities, it was winning support among Government Ministers and Conservative MPs, the corollary to which

⁵¹ Privatisation Gets close examination but interest fades, 1984 Local Government Chronicle 704

⁵² LGC Privatisation Survey 1984-5, 5/6/85 LGC

⁵³ In Cheshire, Cleveland, Cumbria, Derbyshire, Humberside, Lancashire, Norfolk, Oxfordshire and Gwent no privatisation took place at either District or County Level. In Scotland the only evidence of privatisation was a £2000 refuse collection contract on Westray in the Orkneys.

⁵⁴ Ascher, Politics of Privatisation p227

was frustration at the general inactivity of local authorities regarding this issue.

Such was the degree of frustration felt among backbenchers on the issue of competitive tendering and contracting out that Christopher Chope MP⁵⁵, sought leave under the Ten-Minute-Rule "to bring a Bill to make provision for local authorities to put out to competitive tender certain of their functions and services"⁵⁶. Mr Chope's attempt to secure leave to bring this Bill, which he felt would result in considerable savings in local government expenditure, was only defeated by the narrow margin of 170 votes to 167. There is some evidence that, contrary to convention, several ministers wished to vote for the Bill and had to be restrained from doing so⁵⁷.

By late 1984 the Government had clearly come to accept that it would have to play a major role in ensuring the expansion of competitive tendering throughout local government. When asked whether she was satisfied with the level of local authority privatisation, the Prime Minister replied:

"No, I am not. The Government have been considering what might be done to speed things up. We shall announce our intentions very shortly."⁵⁸

The last sentence is a clear reference to the consultation paper which would be issued in early-1985⁵⁹. The Government was committing itself to playing a greater part in seeing competitive tendering extended.

There is one more feature of government policy on competitive tendering throughout this era which should be noted. Both during the period when encouragement of contracting out was the policy, and

⁵⁵ Mr Chope had been leader of Wandsworth LBC during the period of its pioneering privatisation drive. By 1987 he would be part of the ministerial team steering the Local Government Act 1988 through Parliament, and, after losing his seat at the 1992 General Election, he would become a member of the Local Government Commission

⁵⁶ 1983-4 HC Debs Vol 57 col 280.

⁵⁷ Ascher, op.cit. p40

⁵⁸ 1983-4 HC Debs Vol 65 col 886w

⁵⁹ Competition in the Provision of Local Authority Services, DoE 1985

the period when the Government was growing increasingly frustrated at the failure of authorities to use this device, one can call into question the factual basis of ministerial assertions. On several occasions, in spite of extolling the virtues of contracting out, Ministers were forced to admit that:

"No systematic information is collected by the Government."⁶⁰

While the number of authorities actually contracting out services were few, the savings to be made were readily emphasised. However, it was also admitted that no attempt was made by the Government to collate and examine information on this matter. This would tend to suggest that the practical experiences of those authorities pursuing this policy were of less significance than the ideological tenets of reducing the size of government and public expenditure and the conviction that the superiority of the market (in itself an important ideological tenet) would facilitate the accomplishment of these ideals, as well as having other benefits.

⁶⁰ PM, 1983-4 HC Debs Vol 48 col 204, Waldegrave Vol 56 col 23w

CHAPTER 4 COMPULSION BECOMES THE POLICY

1985-7: The Government makes a commitment, but takes no action.

With the issuing of the consultation paper *Competition in the Provision of Local Authority Services* by the Department of the Environment in February 1985 the Government committed itself to compelling the use of competitive tendering with regard to a range of largely manual services. However, it would be three years before the Local Government Act 1988 gave substance to that commitment. Several issues arise regarding government policy during this period.

First, and most importantly, while the Government may have made an ideological commitment to compelling competition for the provision of certain local authority services, it also appears to have failed to appreciate fully the practical consequences of that commitment¹. Consistently between 1985 and early-1987, Cabinet Ministers promised legislation "as soon as possible"². The frustrations of several Conservative MPs at the Government's legislative inactivity during this period were expressed in an adjournment debate³ and a Private Members Bill⁴ which were clearly intended to force the Government's hand.

Various explanations have been proffered for the Government's failure to introduce compulsory competitive tendering legislation in the 1985-6 Session. It was suggested that the Secretary of State for the Environment, Kenneth Baker, was reluctant to pilot

¹ One notable exception to this, however, was the provision of bus services, which were subjected to a competitive tendering requirement by Part V of the Transport Act 1985

² See e.g. Waldegrave, 19/4/85 HC Debs Vol 77 col 300w (promised legislation in the 1985-6 Session); Rumbold 27/2/86 Vol 92 col 664w, 3/3/86 Vol 93 col 33w; Waldegrave 2/5/86 Vol 98 col 356w (as soon as the Parliamentary timetable permits); Chope 4/2/87 Vol 109 col 719w; Boyson 6/2/ 87 Vol 109 col 855w. The Prime Minister also made this commitment: see 12/3/86 HC Debs Vol 93 col 465w

³ 1984-5 HC Debs Vol 83 cols 1126-46

⁴ Local Government (Supply of Goods and Services) Bill 1986-7 HC Debs Vol 114 cols 174-7

legislation on such a politically controversial issue through Parliament so close in the wake of the controversies surrounding rate-capping and the abolition of the metropolitan county councils. It was also suggested that the uneven results of NHS competitive tendering, which had recently been the subject of criticism by the Social Services Select Committee, may have tempered the Government's enthusiasm at this stage⁵. However, in November 1986 the Queens Speech revealed that a Bill introducing compulsory competitive tendering would be brought in the 1986-7 Session.

When the Bill came before the Commons in February 1987 the Secretary of State for Environment was forced to admit that the Government had not had time to draft either the competitive tendering provisions, or the provisions regarding non-commercial considerations⁶. Given the time which had elapsed since the proposals on CCT had first been mooted, and the importance ascribed to these measures by the Government, such an excuse appears feeble, even if the legislative timetable was a packed one and a prorogation was drawing nearer. Clearly ideological commitment had outstripped consideration of the practical issues involved: the provisions of the competitive tendering regime could have been modelled on those of the Local Government, Planning and Land Act 1980 (indeed the tendering provisions of the 1988 Act follow the same broad scheme), or on the tendering provisions contained in the Transport Act 1985 regarding the provision of bus services⁷. However, as has been pointed out by one commentator⁸:

"The scale and complexity of the local government legislative programme since 1979 has been quite unprecedented; so much so that it has often outstripped the government's drafting procedures. The Government has consequently been pressed into using Parliamentary procedures mainly as the opportunity for tidying-up the rough drafts which it has submitted for ratification."

⁵ Council Tenders Bill Shelved FT 2/11/85 p28

⁶ 1986-7 HC Debs Vol 110 col 916

⁷ See S88- 92

⁸ Loughlin, *The Restructuring of Central-Local Government Relations*, in Jowell and Oliver, *The Changing Constitution* (3rd Ed, 1994) at p275

In this instance the ideological commitment to legislate outstripped consideration of the practical issues involved to such an extent that no provisions could be brought before Parliament: it is particularly ironic that, having derided local government for so long because of its failure to adopt competitive tendering, the Government should succumb to a period of inactivity due to its own failure to consider the practical import of its ideological commitment.

Secondly, questions can again be raised about the factual basis for the Government's actions. The Government would often extol the virtues of competitive tendering, but the only benefits publicly identified by Ministers were the savings to be achieved by the application of market disciplines and the consequent reduction in the demands issued to ratepayers⁹. The intention was clearly to present this policy in a way which was attractive to voters, and thus represents an attempt to reconcile this policy with an important characteristic of the Conservative party: namely the pursuit of power¹⁰, which compels the party to present its policies in a way intended to increase its electability. However, the evidence cited regarding savings was quite vague. Very often no evidence was proffered regarding the savings to be achieved. On some occasions, bland statements were made about the actual monetary savings resulting from contracting-out, without identifying the relative importance of those savings¹¹. On one other occasion a Minister stated that:

"141 different councils have contracted out at least one service, at a current annual saving of £22,390,000"¹²

As the 1987 Local Government Chronicle Privatisation Survey illustrated, the value of contracts let to the private sector for the

⁹ This had been a standard formulation since relatively early in the debate. See e.g. Waldegrave, 1983-4 HC Debs Vol 49 col 306; PM, HC Debs Vol 57 cols 137-8; Gow Vol 63 col 1034; Rumbold 1985-6 HC Debs Vol 90 col 303; Ridley 1986-7 Vol 105 col 559.

¹⁰ See Ch 3, *supra*

¹¹ See e.g. PM, HC Debs Vol 57 cols 137-8:

"23 contracts have been let, but they result in a saving of more than £7 million."

¹² Boyson, 1986-7 HC Debs Vol 105 col 244w

provision of services in 1986-7 was £120 million, a comparatively small sum within the context of total local authority spending of £34 billion¹³. Viewed in the context of such a massive budget, savings of less than £23 million (even if not disputed¹⁴) appear less impressive than Dr. Boyson's statement would suggest.

On those occasions when potential savings were expressed as a percentage it was often claimed that:

"Local authorities which have contracted out service provision as a result of competitive tendering regularly report savings of 20 per cent to 30 per cent on previous costs."¹⁵

There are several grounds on which one can take issue with this statement. The first is its imprecision: while potential savings of between twenty and thirty per cent were emphasised, the ten per cent span indicates less than exacting statistical analysis. Secondly, if we assume that the PULSE and Local Government Chronicle Survey figures cited during this period are both correct, then the figures given by Mr. Ridley do not make sense. If the figure of £23 million of savings cited by PULSE is added to the value of the contracts awarded cited by the Local Government Chronicle, then the prior cost of providing those services would have been £143 million. However, when expressed as a percentage of £143 million, the figure of £23 million represents a saving of less than sixteen per cent - far short of even the lower figure cited by Mr. Ridley. Third, the government was still declaring at this stage that it did not collect "systematic data" on the use of competitive tendering and contracting out in the provision of local authority services¹⁶. Thus, while the government did not seek to investigate the matter for itself, it was prepared to disseminate information extolling the financial benefits of competitive tendering, once again indicating that its commitment owed more to ideological than to practical

¹³ 3/7/87 Local Government Chronicle Survey p4

¹⁴ Dr. Boyson used the figures of PULSE, a highly partisan organisation. Contrary to these figures the LGC reported that savings of only £1.5 million had been achieved in 1986-7

¹⁵ See e.g. Ridley 1986-7 HC Debs Vol 109 col 492w

¹⁶ See e.g. Waldegrave, 1984-5 HC Debs Vol 82 col 511w; Rumbold, 1985-6 HC Debs Vol 93 cols 188-9w; 1986-7 HC Debs Vol 107 col 578w

considerations. However, it should be noted that on exceptional occasions Ministers did admit that it was impossible to estimate the financial savings to be reaped from exposing all local authority services to competition¹⁷

The emphasis upon "savings" raises the issue of the application of the concept of "value for money" to competitive tendering. Value for money is generally defined as the pursuit of the "three Es", namely economy, efficiency and effectiveness:

"The NAO gives the '3E's' the following meanings: 'economy' is concerned with minimising the cost of resources acquired or used, having regard to appropriate quality (in short, spending less); 'efficiency' is concerned with how far maximum output is achieved for a given input, or minimum input is achieved for a given output (in short, spending well); and 'effectiveness' is concerned with how successfully outputs of goods, services, or other results achieve policy objectives, operational goals and other intended benefits (in short, spending wisely)."¹⁸

The extent to which the government concentrated on one aspect of the value for money equation is particularly noteworthy. The criterion of economy may be of paramount importance to a government committed to containing public expenditure, but the criteria of efficiency and effectiveness should not be ignored. Comparatively little attention was paid to the effect of competitive tendering upon standards of service, although it must be admitted that, in theory, good post-contractual monitoring of a well drafted specification of the work to be performed should preclude a drop in standards.

While one may question the Government's conception of value for money in the context of competitive tendering, one should not ignore the effect which the threatened imposition of competitive tendering based on the pursuit of value for money was having upon local government culture by the mid-1980s. By 1985 trade unionists had

¹⁷ Rumbold, 1985-6 HC Debs Vol 90 col 511w, Vol 102 col 263w

¹⁸ Harden, Money and the Constitution: Financial control, reporting and audit, [1993] 13 Legal Studies 16 at p24. See also Voytek, Privatising government service delivery: theory, evidence and implications, [1991] 9 Environment and Planning c. Government and Policy 155 at p159

accepted the inevitability of the imposition of compulsory competitive tendering¹⁹, and soon both the Labour Party and the trade union movement were engaged in a reappraisal of the quality and performance of local authority services²⁰. While the Local Government Chronicle Privatisation Surveys of 1985-6 and 1986-7²¹ may have revealed that councils were generally cool on tendering and contracting out, local authorities were preparing themselves for CCT. The 1988 Survey revealed that "Contracting Out Gets a Boost"²², and many of the articles appended to the Survey were aimed at emphasising that direct labour organisations could organise themselves to ensure that they were successful in competition with the private sector²³. In addition, the Audit Commission emphasised in 1987 that the best twenty-five per cent of local authority DLOs were as good as any private sector company trying to supply local government services. When the result of the first tranche of CCT under the Local Government Act 1988 was made public, eighty per cent of all tendering exercises had been won by DLOs. This is a measure of the change in the culture of DLOs in the mid- to late-1980s, which saw them transformed into organisations run increasingly on commercial lines with the aim of securing maximum value for money and winning work in competition with the private sector. Local authorities understood that winning a number of contracts may change little, but losing several may result in the closure of DLOs: operating in a more commercial manner was thus not just a matter of pursuing efficiency, effectiveness and economy - ultimately it was a matter of survival.

The imposition of a tendering regime was not the only issue troubling Government, however. While many authorities were trying to operate in a more commercial manner, a few authorities were attempting to take into account non-commercial considerations in their contract award procedures. The Department of the Environment

¹⁹ See FT 14/5/85 p11 on the Secretary General of the TUC's acceptance of the inevitability of CCT in the foreword to a TUC paper

²⁰ See FT 2/12/85 p10

²¹ See the Local Government Chronicle Surveys dated 4/7/86 and 3/7/87

²² LGC Supplement 8/7/88

²³ See e.g. Griffiths, Talk to Staff, 8/7/88 LGC Supplement 34; Harlow, Barber and Jackson, Shepway DC: the steps to competing successfully, 8/7/88 LGC Supplement 38

had issued Circular 15/83 advising local authorities "not to place restrictions on the employment of a person solely on ideological grounds or on grounds unrelated to competitiveness or competence to carry out the work or supply the goods required"²⁴. Having initially admitted to "practical problems" in preventing authorities' reference to non-commercial considerations in the course of their contractual relationships²⁵, in February 1985 the consultation paper "*Competition in the provision of local authority services*" announced that the Government intended to prohibit reference to non-commercial factors. However, the government was soon to abdicate responsibility for addressing this problem. In reply to a question on this issue, William Waldegrave stated that, although the Government had given commitments to legislate, and was no less concerned about the misuse of contractual powers than it formerly had been:

"... analysis of the recent decision of the House of Lords in the case of *Wheeler and Others v Leicester City Council* has led us to reconsider whether such legislation is necessary ... the decision fortifies the view that authorities which discriminate against firms on the basis of irrelevant political decisions do so unlawfully. The Government appreciate the practical difficulties facing a firm wishing to assert its legal rights in this area, but any new legislation would still require court action to be taken ... by or on behalf of individual companies. It would seem that the law as it stands gives sufficient scope for such action."²⁶

The new policy was "that the existing law is adequate"²⁷, as the decision in *Wheeler*²⁸ illustrated, and that legislation was, therefore, unnecessary as an aggrieved contractor would still have to go to court to enforce his rights²⁹. Given that only two dozen authorities sought information relating to non-commercial matters, and that only six of those councils actually engaged in political discrimination, one may consider this policy shift to be relatively sensible: why use Parliamentary time to address a (statistically)

²⁴ See 1983-4 HC Debs Vol 63 col 49w

²⁵ Waldegrave, 1984-5 HC Debs Vol 68 col 30w

²⁶ 1984-5 HC Debs Vol 84 cols 535-6w

²⁷ Rumbold, 1985-6 HC Debs Vol 98 col 706. See also 1985-6 HC Debs Vol 91 col 399w; Vol 93 col 186w; Vol 94 col 253w

²⁸ 1985 AC 1054

²⁹ See e.g. 1985-6 HC Debs Vol 98 col 707-8

unimportant issue for which the common law already provided an adequate remedy? In the light of the numerous statements describing legislation as unnecessary, it is surprising that Nicholas Ridley spoke with such apparent regret at not being able to bring a non-commercial considerations regime before the Commons as part of the Local Government Bill introduced in the 1986-7 Session³⁰.

In considering Government policy between early-1985 and mid-1987, two salient points spring to mind. The first is that this period is of particular note because of the government's legislative inactivity: having been so critical of local government for its failure to adopt competitive tendering, the government committed itself to compelling its use, then failed to bring any legislation. The second point, which is, to a great extent, the reason for the first, is that Government policy statement's and attempts at action were permeated with inconsistencies and lacking in coherence. The lack of coherence was most obvious in the failure to draft a competitive tendering regime despite the existence of an adequate model and having ample time, and in the changes in policy regarding non-commercial considerations. The lack of consistency is most evident from statements regarding the savings to be reaped from competitive tendering and contracting out.

The Conservative Party fought the 1987 General Election committed to compulsory competitive tendering:

"We will require local authorities to put out to competitive tender a range of services ...

"Ratepayers expect councils to provide their services as efficiently as possible. Yet some local authorities steadfastly oppose private sector companies tendering for services even though they could provide them more cheaply and efficiently. The ... Audit Commission has estimated £500 million a year could be saved if all councils followed the practices of the best -sums which could be used to lower rates or improve services."³¹

The second paragraph illustrates the Conservative belief in the inherent superiority of the private sector, and seeks to use the Audit Commission's figures to emphasise the perceived inefficiency of

³⁰ 1986-7 HC Debs Vol 110 col 916

³¹ The Next Moves Forward: The Conservative Manifesto 1987

local government. However, while the Government were willing to use Audit Commission figures to support their proposition that local government was inefficient, it failed to point out that the Audit Commission had also found that the best twenty-five per cent. of local authority DLOs were as efficient as the best private sector companies.

The Local Government Act 1988's passage through Parliament

The Local Government Bill was one of the first pieces of legislation introduced in the 1987-8 Parliamentary Session³². Part I of the Bill was represented as being:

"... a further significant step in two of the Government's major objectives - introducing greater competition and securing greater value for money. The first steps in this direction were taken in the Local Government, Planning and Land (No. 2) Act 1980."³³

To a certain extent this statement is correct: the provisions of Part I of the Local Government Act 1988 clearly owe much to the provisions of Part III of the 1980 Act³⁴. However, there is little justification for presenting the 1988 Act as being a logical extension of the 1980 Act. There are two reasons for this. First, as was illustrated above, the imposition of CCT upon building and works DLOs had its roots in a different set of circumstances from those which ultimately led to the imposition of tendering under the 1988 Act. Secondly, while the scheme of both Acts is undoubtedly very similar, the concept of competition underlying each was clearly different: the 1988 Act could not be a logical extension of the competition requirements of the 1980 Act simply because, if it had been, then it would have been unnecessary to use the 1988 Act to revise the provisions of the 1980 Act so heavily³⁵.

³² 1987-8 HC Debs Vol 118 col 156

³³ 1987-8 HC Debs Vol 119 cols 79- 80

³⁴ See Part II, *infra* for a discussion of these provisions

³⁵ See Schedule 6 of the 1988 Act

What, however, do the debates relating to the passage of the Local Government Act 1988 reveal about the ideology underlying the Act? First, one must view the provisions of Part I of the 1988 Act within the context of the Act as a whole. The provisions of both Part I and Part II (the non-commercial considerations regime) were intended to establish fairly mechanical, depoliticised, contract award procedures. While the non-commercial considerations regime may go further than simply outlawing political discrimination³⁶, and extends beyond the services subjected to competitive tendering by the 1988 Act³⁷, the practical significance of this regime is increased by the existence of the CCT regime: with the greater number of tendering procedures which could be frustrated by reference to non-commercial factors, a prohibition on their use becomes vital. By limiting authorities to the use of purely commercial factors and by prescribing the tendering procedures which must be adhered to, market forces, as opposed to political or executive value judgements, begin to assume greater importance in making decisions as to service delivery. In effect this represents a restriction of the discretion enjoyed by local authorities to make decisions concerning service delivery. The depoliticisation of local government decision making is a process which is not confined to the Local Government Act 1988, however, and is, for example, detectable in the Local Government and Housing Act 1989.

Second, an examination of the debates during the passage of the Act, once again raises questions about the Government's conception of value for money. The part played by competition in securing value for money was pointed out early in the Second Reading debate:

"The free operation of the market is the best way of delivering greater choice, higher productivity and better quality services at lower prices"³⁸

³⁶ The non-commercial considerations regime will be examined in detail in Part II Chapter 6

³⁷ The six services originally subject to the 1988 Act's provisions were refuse collection, ground maintenance, vehicle maintenance, street cleaning, catering, and building cleaning

³⁸ Ridley, 1987-8 HC Debs Vol 119 col 80

Throughout the course of the Bill's passage, the Government was at pains to emphasise the nexus between "savings" and "value for money":

"Competitive savings are typically between 20 per cent and 30 per cent. If we hit a modest saving of 10 per cent savings, it would save about £300 million a year. That is worth saving."³⁹

The emphasis in debate was upon passing on savings to ratepayers⁴⁰, rather than on the other postulate of the 1987 Conservative Manifesto: improving services. Such an emphasis would appear to indicate that the legislation was intended to play an important part in controlling local government expenditure. While the focus may have been on the "economy" aspect of value for money, attempts were made to pre-empt concerns about efficiency and effectiveness by pointing out that exhaustive service specifications and monitoring of work being performed should prevent a decline in standards⁴¹. However, there is a distinction to be noted here regarding the potential effects of the legislation: savings were represented as the inevitable result of the competition required by the Act, but a decline in services could only be prevented by the actions of each authority in the course of the contractual process. This distinction becomes more pointed when one realises that, while the 1988 Act did contain certain requirements regarding specifications⁴², the monitoring of contracts is not addressed by the Act.

The passage of the Local Government Bill through Parliament was far from smooth: although a disproportionate amount of time was spent discussing the abolition of dog licenses and the notorious clause 28, debate on Part I of the Bill is quite revealing. Deep and genuine concerns were raised about numerous aspects of the competitive tendering regime, particularly its scope (both in terms of the services covered by the Bill's provisions, and the ability of

³⁹ Ibid. col 82

⁴⁰ See e.g. Chope, Standing Committee A, col 150; Lord Belstead, 1987-8 HL Vol 491 cols 1025-6

⁴¹ See e.g. Ridley, 1987-8 HC Debs Vol 119 col 82-3

⁴² See S7, discussed *infra*, Part II chapter 2

the Secretary of State to use his powers to add any service to the list of "defined activities"), the possibility that competent DSOs would be replaced by incompetent contractors, the accounting regime, and the powers reserved to the Secretary of State regarding the making of regulations and issue of directions, including the power, ultimately, to direct that a DSO should cease to have the power to perform a service⁴³. Debate at every stage was polarised along party lines, with the government being determined to see that the scheme of the Act should allow decisions about service delivery to be dictated by the market as much as possible. However, it is noteworthy that free market principles were only being applied to a limited range of services.

The reasons why the 1988 Act initially only related to a limited range of services become apparent when the attempt of four doctrinaire free-market Conservatives members of the Standing Committee to expand dramatically the range of services subject to CCT is considered. In effect, the four MPs in question were attempting to have the vast majority of local government services included in the list of defined activities. The Parliamentary Under-Secretary of State for the Environment, Christopher Chope, thanked the MPs "for demonstrating the potential scope for the discipline of the competition process in local government services and administration"⁴⁴ and proceeded to detail why the Government was averse to extending the list of defined activities to include the many services contained in the proposed amendments. Mr Chope noted that the process of competition for the six defined activities included in the Bill would be a massive undertaking, and that the Government did not wish to overload the administrative process of competition. Moreover:

"... I firmly believe we must be selective initially and go for those services which are both large enough for savings on them to add up to substantial amounts and sufficiently definable and free standing for specifications and contracts to be drawn up in a reasonably straightforward way."⁴⁵

⁴³ These provisions will be discussed at length in Part II

⁴⁴ 1987-8 Standing Committee A col 180

⁴⁵ Ibid. col 180

This statement is of significance for two reasons. First, given that the proposed amendments included a considerable number of administrative services, some importance must be attached to the Government's reluctance to extend the list of defined activities to those services "not sufficiently definable and free standing" for specifications to be drawn up. Secondly, it is notable that, at least initially, only those services from which "substantial savings" could be derived would be subject to competition. It is implicit in this statement that the Government wished to select carefully those services which would result in the most visible savings and thus enable it to represent its policy as a success. In addition, one could be forgiven for thinking that, in choosing only those services from which "substantial savings" would result, the Government was either aware that the private sector would be reluctant to tender for certain services, or was implicitly accepting that the private sector did not enjoy an inherent superiority in relation to all services.

Closely related to the issue of "substantial savings" was the fact that competitive tendering under the 1980 Act and the Bill's provisions would be of such a magnitude that:

"...the annual value of work presently carried out by DLOs but subject to competition will be almost £5 billion. The length of the list of activities not yet covered should not obscure the fact that if all those that could be added immediately could be added, their value would be dwarfed by the value of those that we have already tackled."⁴⁶

It was thus claimed that the most substantial services in terms of expenditure, and presumably the worst in terms of inefficiency, would be tackled with the passage of the 1988 Act. As the value of other services was not as great, savings from them would not be quite so "substantial", and consequently they would not be included in the list of defined activities.

The Local Government Bill found its way onto the statute books in February 1988. However, the criteria used for inclusion of a service in the list of services subject to CCT raises questions about the

⁴⁶ Ibid. col 181

coherence of Government policy in the period following the passage of the 1988 Act.

CHAPTER 5
LOGICAL CONCLUSIONS?
GOVERNMENT POLICY ON COMPETITIVE TENDERING 1988-

Almost as soon as the Local Government Act 1988 had been passed, attention was focused on the extension of compulsory competitive tendering to other services, particularly those of a professional or administrative nature. Backbenchers began to ask questions about the possibility of extending CCT to administrative services. Initially Ministers replied that:

"My hon. Friend is right in emphasising that there are similar savings to be made by submitting administrative services to competition. I hope that local authorities will go down that road *voluntarily*, rather than our having to compel them to do so."¹

The similarity between this reply and those previously given in relation to the application of CCT to blue-collar services, is obvious. Once again the Government was adopting a policy of encouragement rather than compulsion. This policy obviously had much to do with the reluctance expressed by the Government during the passage of the 1988 Act to impose CCT on services which were not sufficiently definable, or from which "substantial savings" would not result². The task of determining the extent to which administrative services should be subject to competition should therefore be left to those local authorities innovative enough to explore the possibilities.

At this time a number of local authorities were experimenting with competitive tendering for administrative and professional services. Westminster City Council had subjected its architects department to competitive tender several years earlier, and had consequently contracted out the service. Most authorities, however, retained professional and administrative services in-house, and only engaged private contractors to carry out work of a specialised nature, or where the volume of work was so small that in-house provision of the service was rendered impracticable. The Local

¹ Chope 20/4/88 HC Debs Vol 131 col 821. Emphasis added

² See Ch 4, *supra*, and 1987-8 Standing Committee A, cols 180-1

Government Chronicle Privatisation Survey for 1990-1 revealed that fifty per cent of authorities used external printers, thirty-three per cent used private security firms, forty-eight per cent used the private sector to pursue debts, seventy per cent used outside firms for software development, and sixty-five per cent relied on external agencies for personnel advertisements, while legal firms were used by fifty-nine per cent of local authorities for advocacy and litigation work, by fifty-one per cent for special projects and litigation, and by twenty-eight per cent for conveyancing³ Thus, while there were high profile examples of privatisation of council legal departments⁴, or budget preparation functions⁵, privatisation of discrete white-collar departments was rare, although the private sector was involved in the provision of many aspects of professional and administrative services on a fairly regular and extensive basis.

The 1991 Privatisation survey also revealed much about chief executives' views on large scale contracting out: eighty-one per cent of local authority chief executives did not think that the costs of contracting out professional and administrative services would be outweighed by savings⁶. Authorities which had exposed their white-collar services to competition generally found that their in-house service was competitive: eighty-two per cent of authorities which had compared in-house and private sector legal costs found their in-house costs to be competitive⁷. Local authorities were, therefore, not averse to the use of competitive tendering, or to using the private sector to perform white collar services, but did question the efficacy of subjecting administrative and professional services to competition as a matter of course. However, in what way did the Government's views on the extension of CCT develop during this period?

³ Local Government Chronicle Privatisation Survey 1991, 5/7/91 LGC pp 19-20

⁴ See e.g. Into the Private Court, 7/7/89 LGC Privatisation Survey p4, concerning the privatisation of West Willshire's legal department.

⁵ See Chief Extends Limits of Tender Process, 6/9/91 LGC 14, concerning South Oxfordshire DC's decision to award a budget preparation contract to Touche Ross in spite of a lower in-house bid

⁶ Ibid. p18

⁷ Ibid. p19

In the three years after the passage of the 1988 Act only one other service was subjected to CCT: management of sports and leisure facilities⁸. There were comparatively few pronouncements regarding CCT. Occasionally, the Government would point to the benefits arising from the use of competitive tendering⁹, or make a statement concerning the Secretary of State's use of his default powers¹⁰. However, apart from the statement noted above encouraging local authorities to extend competitive tendering to white collar services voluntarily¹¹, virtually nothing was said about the extension of CCT to professional and administrative services until late-March 1991. By then Mrs. Thatcher had been replaced by Mr. Major, who was known to favour the extension of CCT beyond the range of essentially manual services defined in the 1980 and 1988 Acts. On 21st March the Secretary of State for Environment announced his intention to extend CCT to legal and computing services¹². A week later, in reply to a question concerning the means by which CCT would be extended, a junior Minister stated:

"If further services are brought within the scope of the competitive tendering provisions of the Local Government Act 1988, consultation of local government representatives is a statutory requirement. If a new statutory framework is proposed, we shall want to take account of the views of local government in taking forward our proposals."¹³

The possibility of a new statutory regime to accommodate the extension of CCT was thus mooted.

With the publication of the *Citizen's Charter* White Paper¹⁴ in July 1991, the Government committed itself to the widest possible application of competitive tendering in the belief that this would

⁸ See Local Government Act 1988 (Competition in Sports and Leisure Facilities) Order 1989 S.I. 2488

⁹ See e.g. PM, 1990-1 HC Debs Vol 178 col 189w

¹⁰ That is the powers contained in S19A and S19B of the 1980 Act and S13 and S14 of the 1988 Act. These will be discussed at length in Part II Ch 5

¹¹ Chope 1987-8 HC Debs Vol 131 col 189w

¹² 1990-1 HC Debs Vol 187 col 402

¹³ Portillo, 1990-1 HC Debs Vol 188 col 537w

¹⁴ Cm 1599

benefit service consumers and taxpayers. Later, the consultation paper *Competing for Quality: competition in the provision of local government services* outlined the government's proposals for clarifying the requirement to submit local authority services to competition, and for extending CCT to professional and administrative services.

The commitment to extend CCT to professional and administrative services again raises the issue of coherence of government policy. In view of the fact that the Government had ensured that those services were excluded from the list of defined activities initially subject to CCT by virtue of the Local Government Act 1988, apparently due to difficulties in defining the services, and because it was felt that the savings to be realised would not be substantial enough¹⁵, one must ask: what had changed which now rendered professional and administrative services amenable to CCT?

It would appear that very little had changed since the 1988 Act. Certainly the vast majority of chief executives opined that white collar services were competitive with the private sector, which implies that "substantial savings" would not result. However, perhaps the most significant support for the view that little had changed is contained in the report that the Department of the Environment had commissioned from PA Consulting concerning the possible extension of CCT to white collar services¹⁶. This report, which was leaked during the passage of the Local Government Bill through Parliament in the 1991-2 Session, identified four reasons why CCT for professional and administrative services would be a more complex proposition than CCT for other services. First, the services in question were carried out on a different scale, and possessed a different nature in different councils. Second, there existed wide variations in the organisation of corporate services and also as to the extent of devolution or decentralisation in each authority. Third, there was a direct link between several white collar services and the democratic process. Finally, there was a lack

¹⁵ 1987-8 Standing Committee A cols 820-1

¹⁶ See for a summary, Labour Says CCT Advice Unheeded, 10/1/92 LGC 1; Maclure, DoE Refuses to Heed CCT Advice, 17/1/92 LGC 8

of demonstrable savings where white collar services had been subjected to competitive tendering.

PA Consulting, moreover, identified several potential difficulties which may arise from introducing CCT for white collar services. It was felt that where a service was carried out on a small scale, tendering costs could outweigh the benefits: that there could be difficulties experienced in defining the parameters of the services subjected to competitive tendering; that it might be possible for councils to reallocate service responsibilities from those areas subject to competitive tendering to those which are not; that wide variations would exist between authorities with regard to identifying what constituted the service subject to competition; and the fact that competition may force an element of rigidity into councils' organisational arrangements, thus stifling innovation. The report concluded that an internal market should be created in local authority services, that cross-boundary tendering should be permitted, and that authorities should be required to put only proportions of their services out to tender.

The PA Consulting report clearly expressed reservations relating to how definable professional and administrative services can be, and the extent of savings which could be realised from white collar competitive tendering. However, in spite of the fact that it was the Government which had originally set the existence of a discrete and definable service, and the realisation of substantial savings, as the criteria for the extension of CCT, this report was largely ignored. Why did the Government choose to depart from the criteria which it had established, ignore the problems recognised in the PA Consulting report, and seek to extend CCT to professional and administrative services?

The answer can be found in the *Citizen's Charter* White Paper's commitment to the widest possible application of competition, and in the Treasury White Paper *Competing for Quality* ¹⁷. In the forward to the latter the Chancellor of the Exchequer, Norman Lamont, emphasised the virtues of competition:

¹⁷ Cm 1730

"...competition is good for the *users* of public services. It gives them a wider variety of facilities and services. Competition is good for *taxpayers*, who get better value for their money. It is good for *managers*, who can concentrate on their core activities, looking for the best deal for their customers. It is good for *staff*, who can give of their best in a more competitive environment. And it is good for *business*, giving private firms new opportunities to market their services.

"Competition is also good for the economy as a whole. It releases new ideas and new ways of doing things. it cuts through red tape and speeds up procedures."¹⁸

Once again this illustrates the Government's belief in the innate superiority of the market. Competition, is seen as the panacea for all economic ills and deficiencies in efficiency, and the benefits of competition in the provision of public services outweigh the difficulties. However, this ideological belief in the superiority of the market may explain why the Government were committed to the extension of CCT, but does not present a cogent argument for setting aside the criteria which had previously been applied in determining whether to extend CCT to a new service, or for ignoring the difficulties identified by PA Consulting which reflected those criteria.

The chapter of *Competing for Quality* relating to competition for local authority services contained much praise for those authorities which had voluntarily extended competitive tendering¹⁹, and set out the proposals for the extension of CCT:

"The Government has been considering the experience of local authorities using the private sector to provide functions not currently covered by statutory competition requirements, including professional services. In the Government's view there is scope for extending competition to cover professional functions. The tendering process for professional functions may require different procedures to those currently laid down for manual services. Nevertheless, good management and value for money in the provision of professional services are more likely to be achieved if the existing organisation of services has to face the challenge of competition."²⁰

¹⁸ Ibid. pII

¹⁹ Ibid. p23, 24

²⁰ Ibid. p24

The Government once again placed considerable reliance on the experience of those authorities which had experimented with white collar competitive tendering. However, the different procedures identified in the White Paper reveal little that is new²¹. Internal trading accounts had been established, in effect, for each service previously put out to tender²². The requirement that only a percentage of each service should be exposed to competition bears similarities to the arrangements initially pursued for other services, most notably maintenance under the Part III of the Local Government, Planning and Land Act 1980. The commitment to clarify anti-competitive behaviour²³ reveals nothing other than a desire to see a perceived imbalance in tendering procedures redressed in order to give the private sector a greater chance of success. However, the proposals did not address concerns regarding the problems of defining professional and administrative services.

It is important, however, to realise that the commitment to extend the use of competitive tendering throughout the agencies of government which is contained in *Competing for Quality* is of wider importance than one may initially realise. Apart from being a commitment to pursue greater value for money in the performance of the functions of governmental agencies, it should be realised that it is also of considerable importance to the process of restructuring the role and institutions of government which has become one of the major policy themes of the Major administration, although it is a process which was begun by the Thatcher administration. It is necessary to discuss this policy initiative in order that the provisions of the Local Government Act 1992 which will be discussed below may be placed in their proper context and fully understood.

²¹ See pp 24-5.

²² See 1980 Act, S10; 1988 Act S9

²³ Ibid. p25

The Restructuring of Government

Successive Conservative governments have subjected the organs of central²⁴ and local government to market forces in order to determine patterns of service delivery, and to a process of institutional restructuring. Numerous parallels can be drawn between the process of change in central and local government. However, perhaps more importantly, it is also necessary to place events in the sphere of local government within the wider context of change in all governmental institutions which has occurred since 1979.

It must be remembered that the Conservative's General Election Manifesto in 1979 contained a commitment to the "reduction of waste, bureaucracy and over-government" throughout all governmental institutions, and not merely local government²⁵. Over the past sixteen years successive Conservative Administrations have consequently sought to redefine the role and structure of government and to extend the use of market-based techniques to as many governmental institutions as possible. Throughout the 1980s a variety of initiatives were pursued: civil service manpower was progressively reduced, competitive tendering for ancillary services was used extensively in the NHS after 1983, and efficiency in central government was promoted via the use of Rayner scrutinies and the Financial Management Initiative. However, perhaps the most significant development in central government was heralded by the publication of the Next Steps report by the Prime Minister's Efficiency Unit in 1988²⁶. In the interests of efficiency this report proposed that a distinction should be made between the policy functions of departments, and the service delivery functions. The latter functions could be performed by Executive Agencies which, as discreet managerial organisations, would be able to pursue the ideal of value for money by securing economy, efficiency and

²⁴ For a general discussion of the process of change in central government see Drewry, *Revolution in Whitehall: The Next Steps and Beyond* in Jowell and Oliver, *The Changing Constitution* (3rd Ed. 1994)

²⁵ Conservative Manifesto 1979: *Restoring the Balance*.

²⁶ *Improving Management in Government: the Next Steps*, Prime Minister's Efficiency Unit (1988)

effectiveness in the delivery of the service which they provided. The original intention was that ninety-five per cent of the civil service should be transferred to Executive Agencies, and this process is at present well advanced²⁷. A parallel process has occurred in the NHS with the creation of NHS trusts.

Initially the functions of Executive Agencies, and, indeed, of those parts of the civil service which had not achieved agency status, were not subject to competition. However, this changed with the publication of the *Competing for Quality* White Paper in 1991²⁸. *Competing for Quality* contained a commitment to the greater use of competition in not only local government²⁹, but also in the NHS³⁰ and central government³¹. This meant that "market testing" - simply competitive tendering by another name- would be more extensively used in central government:

"... departments and Executive Agencies will in future set targets for testing new areas of activity in the market, to see if alternative sources give better service and value for money."³²

Since the publication of *Competing for Quality* the Government has gone a step further by applying the "prior options test"³³ which involves posing several questions in relation to each function performed by central government :

"...Does the job need done at all? ... If the activity must be carried out, does the Government have to be responsible for it? ... Where the Government needs to remain responsible for an activity, does the Government have to carry out the task itself? ...

²⁷ As of July 1994 there were 97 Executive Agencies employing 64 per. cent of all Home Civil Service Staff; see Treasury and Civil Service Committee Fifth Report: The Role of the Civil Service (1993-4) HC 27 Vol 1 para 154

²⁸ Cm 1730

²⁹ Chapter Five. See above for a discussion.

³⁰ See Chapter Four

³¹ See Chapter Three

³² Cm 1730, p 8

³³ See Drewry, op. cit. at p 171-2; Treasury and Civil Service Committee, Sixth Report (1992-3), vol. ii para 3

Where the job must be carried out within Government is the organisation properly structured and focused on the job to be done?"³⁴

If the function does not need to be provided by Government, it will withdraw from providing it: where this happens, the service in question will either disappear, or the private sector will fill the gap in service provision. If there is some justification for providing the service, the question arises: does Government need to be responsible for it? If the answer is no, the Government will seek to privatise it. Alternatively, if it is decided that central government does need to provide a service, a decision must be taken as to whether or not it also has to perform the service. Thus a market testing exercise will almost certainly be initiated, with civil servants competing with the private sector for the right to perform the work. Finally, if all of the other options have been deemed inappropriate, a decision must be taken as to whether or not an Executive Agency should be charged with delivery of the service. Even then the process has not finished, as Executive Agencies are subjected to the prior options test at periodic intervals³⁵. The result of the application of the "prior options test" is an increasingly diverse pattern of service delivery in central government:

"In some instances, we took the strategic view that, in future, the work in question should be done by the private and not the public sector. In others, we found that the work no longer needed to be done at all. In several cases, we found ways of increasing in-house efficiency without going out to tender. In a host of others, services have now been successfully market tested, with the public and private sectors competing for work."³⁶

In order to facilitate the contracting out of functions which results from the application of the prior options test, Part II of the Deregulation and Contracting Out Act 1994 enables Ministers to contract out the exercise of their statutory functions³⁷. It would

³⁴ The Civil Service: Continuity and Change (1993-4) Cm 2627 para 2.25

³⁵ See Fifth Report of the Treasury and Civil Service Committee, op. cit. Vol I paras 178-9.

³⁶ Waldegrave, 1992-3 HC Debs Vol 231 col 526

³⁷ See S69, which permits Ministers and office holders to contract out the exercise of their functions for a period not exceeding 10 years. The equivalent, although by no means identical, provision relating to local government functions is S70. For a discussion of the provisions of Part

appear that the prior options test has had an influence on the provisions contained in S69: its sole purpose is to facilitate the contracting out of functions which would occur after a decision had been made to privatise performance of a service, or after a market testing exercise had been conducted, but also, less obviously, it recognises that direct service provision may be a viable, and possibly the most efficient, option, by providing that, in spite of the fact that another person has been authorised to perform a function, this does not prevent a Minister or office holder (perhaps an Agency Chief Executive) from performing that function³⁸. However, it should be noted that there are certain matters excepted from the ambit of S69.

The Deregulation and Contracting Out Act 1994 provides that certain functions may not be contracted out³⁹. This gives some indication of what will constitute the "inescapable core of government" which Stephen Dorrell referred to when Financial Secretary to the Treasury⁴⁰, in spite of the fact that one other Government Minister recently told the Treasury and Civil Service Committee that it would be "a waste of philosophical effort" to attempt to set out an enduring definition of the "inalienable core" of government⁴¹. Even if the "inalienable core of government" is not an immutable concept, the matters excluded from the ambit of the powers to contract out functions contained in the 1994 Act give some indication of what the Government presently considers to constitute the core of governmental activity. Most obvious amongst these are the exercise of judicial functions⁴², and the power to make subordinate legislation⁴³, and the power of right of entry, search or

II of the 1994 Act relating to the contracting out of central government functions see Freedland, *Privatising Carltona* : Part II of the Deregulation and Contracting Out Act 1994, 1995 PL 21

³⁸ S69(5)(c)

³⁹ See S71

⁴⁰ See e.g. Dorrell maps out long march of privatisation through Whitehall, 27/11/92 LGC 10. See also Fifth Report of the Treasury and Civil Service Committee, *The Role of the Home Civil Service (1993-4)* HC 27 Vol I para 173 fn 8

⁴¹ *Ibid.* para 175

⁴² S71(1)(a)

⁴³ S71(1)(d)

seizure of property⁴⁴. Less obviously the functions of the official receiver may not be contracted out⁴⁵, and more cryptically, nor may be any function the exercise, or failure to exercise, which "would necessarily interfere with or otherwise affect the liberty of any individual"⁴⁶. It would thus appear that, when an activity is subjected to the prior options test, the fact that it falls within the ambit of one of the exceptions listed in S71 of the 1994 act will identify it as a function which central government needs to carry out and preclude it from being privatised or subject to a market testing exercise.

It should not be lost sight of that the various initiatives which successive Conservative administrations have pursued in relation to central government have had as their objective the realisation of greater value for money. This was certainly one of the justifications for the creation of Next Steps Agencies after 1988, and was always the primary justification for the use of market testing. However, the prior options test places these two initiatives in the context of other devices apparently intended to achieve greater value for money. In doing so, it reveals much about the direction which Government policy is now taking. The pursuit of value for money is no longer the criterion for determining how a function should be performed by central government, but is also, apparently, the principal criterion in determining the scope and structure of central government: the prior options test requires consideration of whether a function needs to be performed by or on behalf of government; whether it can be privatised, in which case central government can progressively reduce its role to that of simply being a purchaser of services; finally, if all other questions have been answered in the negative, it forces consideration of whether an Executive Agency should be formed.

A number of parallels and contrasts can be drawn between events in local and central government since 1979. Both have been increasingly subjected to the rigours of market forces. However,

⁴⁴ S71(1)(c)

⁴⁵ S72(2)

⁴⁶ S71(1)(b)

whereas CCT in local government has been imposed by statute, market testing in central government until recently has been the result of the Government's use of its common law powers. Moreover, whereas the imposition of CCT in local government preceded institutional reorganisation, and that the use of competitive tendering in the NHS pre-dated the creation of trusts, in central government the most obvious measure of institutional change, the creation of Executive Agencies, preceded the extensive use of market testing. In spite of the fact that there would not appear to have been a coherent attempt to impose competition and institutional change across local government, central government and the NHS, the changes which have occurred have common roots in a belief of the superiority of the market, and the pursuit of value for money. They also have certain shared effects: most obviously one would cite the emergence of the purchaser-provider split, which is really the result of the wider moves to redefine the province of government, its structure and the way in which it performs its functions.

It is, however, the approach which has been taken to the current attempt to redefine the scope and structure of government which is of particular interest. In seeking to reconstruct the institutions of government, particular emphasis has been placed on the pursuit of value for money. The criteria of economy, efficiency and effectiveness are thus of considerable importance to this process⁴⁷. While these criteria may validly be taken into account in determining the method of service delivery, it should be realised that they have their limitations, and that there are dangers inherent in their use in an attempt to determine the role and structure of government. It must be remembered that these are economic criteria, originally intended to be used to justify the application of market-based, primarily private sector, techniques, to the working practices of governmental institutions. To apply these criteria in order to reconstruct the province and institutions of government comes perilously close to allowing market-based techniques to become the master of government, not its servant. Government may

⁴⁷ The intention to use these criteria to shape the structure of local government was particularly obvious: see below

be an economic actor, but it is essentially a political beast⁴⁸. Government is not like a public limited company: the free market alone cannot determine its size and shape. Politics permeates the work of Government institutions: the justification for the existence of those institutions which deliver services is that their role is to give effect to the decisions of their political masters. Attempts to define the role and structure of governmental institutions by reference to economic criteria may ultimately impoverish those institutions, simply because the institutions of government cannot be viewed in a political vacuum. However, one must also ask whether any concerted attempt to redefine government by reference to market-based techniques can ultimately be successful given the propensity of politicians to interfere with decisions about service provision where matters of political salience arise⁴⁹.

Having examined briefly the wider use of market-based techniques in the public sector, and the process of restructuring the institutions of government, it now remains to discuss the extension of CCT after the passage of the Local Government Act 1992, and the process of local government reorganisation of which that statute marked the beginning.

The passage of the Local Government Act 1992 through Parliament

How much does the passage of the Local Government Bill through Parliament in the 1991-2 Session reveal about the Government's intention to pursue the ideal of competition? The first thing one must do when examining the provisions of the Local Government Act 1992 relating to CCT is ask whether all of its provisions were necessary? Certainly, activities could be subjected to CCT by virtue of the Secretary of State issuing the relevant order under the 1988 Act, which also provides mechanisms to tailor a tendering process for a particular service: the provisions enacted as S8 of the 1992

⁴⁸ Nicholas Ridley accepted this fact in *The Local Right: Enabling not Providing*, Chapter 3

⁴⁹ See Dudley, *The Next Steps Agencies, Political Salience and the Arms Length Principle*; Barbara Castle At the Ministry of Transport 1965-68, [1994] 72 *Public Administration* 219

Act, which were intended to regulate the regime for white collar CCT, are thus superfluous⁵⁰.

The Local Government Bill was introduced in the House of Lords early in the 1991-2 Session. Less than a fortnight after the consultation paper "*Competing for Quality - Competition in the Provision of Local Services*" was issued, the Bill received its second reading. Baroness Blatch, Minister of State at the Department of the Environment, identified two aims underlying the Bill's CCT provisions: to "implement the commitment in *The Citizens Charter* White Paper to ensure that contractors have a fair chance to compete for local authority work", and to extend CCT to professional services⁵¹.

The first aim begs the question: at what point does helping potential contractors to compete actually contravene the dual principles of the superiority of the free market and the pursuit of value for money on behalf of consumers? There may come a point where tensions exist between the interests of the contractor and the interests of the consumer, necessitating a re-evaluation of which is to enjoy primacy. The second aim also raises the important question of how exactly the Government had resolved the practical difficulties involved in CCT for professional services. It would subsequently become apparent that the Government had not fully resolved the problem of defining professional and administrative services, although statements made in the course of the Bill's progress through Parliament indicate that it was convinced that substantial savings were to be realised from the application of CCT to those services.

Very little information can be gathered from a simple examination of the Bill's provisions. The two central provisions of the Bill, clause 8, relating to the application of CCT to professional and administrative services, and clause 9, which sought to establish a framework for defining anti-competitive conduct, were drafted in a

⁵⁰ The necessity of S8 of the 1992 Act will be discussed more fully in Part II chapter 1

⁵¹ 1991-2 HL Vol 532 col 709

most skeletal manner. Both provisions endowed the Secretary of State with an extensive range of powers, and were consequently heavily criticised by Lord Simon of Glaisdale⁵². However, the Government was determined to see these provisions enacted intact, and thus was prepared to disregard concerns about their constitutional propriety.

In the Commons the CCT provisions of the Bill were presented as "bringing up the rear and ensuring that local authorities that have not yet taken advantage of those techniques are brought up to the level of the best"⁵³. The Government's arguments bear considerable similarity to those employed during debates on the 1988 Act: emphasis was placed on the benefits of competition, which had been displayed by the work of a few pioneering (invariably Conservative) local authorities, which had realised almost incredible savings by subjecting certain services to competition and contracting them out to the private sector, and, as other, less enlightened, local authorities had failed to follow this example, the only option was to compel them to do so by means of legislation. Underlying this is the belief that the free market is the ultimate arbiter of economic efficiency. The provisions of clause 9 in particular were, ostensibly, sought in order to protect the operation of market mechanisms by permitting the Secretary of State to enact a regime of subordinate legislation proscribing those practices of local authorities which were perceived to preclude the private sector from competing effectively in the market place. The extremely broad powers contained in the Bill were therefore considered to be very necessary.

As with the other statutes imposing CCT the provisions of the 1992 Act must be viewed in their legislative context: most significantly the Local Government Act 1992 also put in motion the process of local government reorganisation in England. Central to local government reorganisation in not only England, but also Scotland and Wales is the concept of the enabling authority. This concept, and the role which CCT plays in it, merit deeper consideration. However, prior to doing so it is desirable to examine

⁵² [1991-2] HL Vol 533 cols 83-5

⁵³ Portillo, 1991-2 HC Debs Vol 202 col 111.

briefly the extension of CCT since the 1992 Act, and the manner in which the Secretary of State has utilised his powers under that statute.

Developments regarding CCT 1992-1995

Since the passage of the 1992 Act there have been significant developments in two areas. First, the circumstances in which CCT has been extended to new services. Secondly, the emergence of a body of subordinate legislation to regulate the competition process, and to proscribe certain activities as anti-competitive reveals much about the model of competition which the Government wishes to pursue.

The extension of CCT

The extension of CCT since the passage of the 1992 Act reveals much about the coherence of Government policy. Having sought the powers contained in S8 of the 1992 Act in order to tailor the competition process for professional and administrative services, no commencement order has yet been issued to bring that section into force. The extension of CCT to white collar services has therefore proceeded solely on the basis of the powers given to the Secretary of State by the 1988 Act. While the commitment to extend CCT to white collar services which was obvious prior to and during the course of the 1992 Act's passage, has since been restated⁵⁴, it would appear that much of the impetus to ensure its application was lost after the 1992 Act was passed. It was more than two years before housing management became the first white collar service would be added to the list of defined activities contained in the 1988 Act⁵⁵. Both legal services⁵⁶ and construction and property

⁵⁴ See e.g. Howard, The Advance of White Collar Competition, 13/11/92 LGC 10; Howard, 1992-3 HC Debs Vol 213 col 744w; Squire, 1992-3 HC Debs Vol 223 col 42w

⁵⁵ See Local Government Act 1988 (Competition) (Defined Activities) (Housing Management) Order 1994 S.I. 1671

⁵⁶ Local Government Act 1988 (Competition) (Defined Activities) Order 1994 S.I. 2884

related services⁵⁷ were added to the list of defined activities in November 1994. However, these three services are, as yet, the only ones to have been added to the list of services subject to the 1988 Act's provisions, although there are plans to add computing⁵⁸, finance⁵⁹ and personnel⁶⁰ services. Local government reorganisation has undoubtedly had a considerable effect on the timetable for the introduction of CCT for white collar services. However, one must distinguish between problems in defining the services which are to be subject to CCT, and problems in the application of CCT arising from reorganisation. It was accepted by mid-1993 that CCT for new services would not apply in those authorities affected by reorganisation until after the process of reorganisation was complete⁶¹.

One must, however, question the Government's approach to defining the white collar services which will be subject to competition. There has been considerable uncertainty regarding the extent to which CCT will apply to white collar services. This has been particularly evident in relation to the debate over the application of CCT to finance⁶² and computing⁶³. The Government has not had a clear conception of the extent to which white collar services should be subject to CCT. Some of the confusion surrounding the application of CCT to professional and administrative services may have its roots in the statutory mechanisms used to implement it. The abandonment of the powers contained in S8 of the 1992 Act meant

⁵⁷ Local Government Act 1988 (Competition) (Defined Activities) (Construction and Property Services) Order 1994 S.I. 2888

⁵⁸ See e.g. Computing moves up on competition list 16/4/93 LGC 1; Ministers issue details on CCT for finance and IT, 28/10/94 MJ 5

⁵⁹ See e.g. Financial timetable 29/7/94 LGC 13; CCT for finance is increased to 35%, 28/10/94 LGC 5

⁶⁰ See e.g. KPMG cautious on CCT extension, 16/9/94 LGC 2

⁶¹ See e.g. Hunt, 1992-3 HC Debs Vol 225 col 719w on reorganisation in Wales. See Part II chapter 1 for a discussion of the regulations delaying the application of white collar CCT

⁶² Skewed sampling used to propose 75% finance CCT, 5/8/94 LGC 2; CCT for finance increased to 35%, 28/10/94 LGC 5; Finance CCT: 35% of what? 11/11/94 LGC 15; CIPFA warns of rise in finance exposure, 17/3/95 LGC 3 (from 35% to 70%)

⁶³ See e.g. Consultants cautious about defining size of IT for CCT, 15-21/7/95, on the report CCT for white-collar services: the IS/IT service, KPMG, 1994

that both the definition of the professional and administrative services subject to CCT, and the establishment of a competition framework, would have to be conducted using the powers provided by the 1988 Act. The decision to use the powers in the 1988 Act rather than those which had been sought specifically for the purpose of establishing a white collar tendering regime may well have delayed the process of extending CCT. However, while S8 of the 1992 Act may have provided a mechanism for establishing tendering regimes for specific white collar services, it also provided that those services would have to be added to the list of defined activities for the purpose of the 1988 Act⁶⁴. Thus, irrespective of which statutory regime was used, a service would always have to be defined using the powers contained in the 1988 Act. Therefore, it is likely that the Government had simply failed to appreciate the complexities of submitting white collar services to competition when it enacted the 1992 Act. Some assistance for this proposition may be drawn from contrasting the approach of the 1988 and 1992 Acts. Whereas the services initially subject to CCT under the 1988 Act were fairly extensively defined in a schedule to the Act⁶⁵, and the matter had obviously been given considerable thought prior to the legislation being brought before Parliament, the structure of the 1992 Act militated against this happening for white collar services. The 1992 Act may have embodied the commitment to extend CCT to white collar services, but the skeletal form of its CCT provisions, and the fact that professional and administrative services would still have to be defined under the 1988 Act's provisions, obviated the need to consider the precise definition of those services until after the 1992 Act had reached the statute books. Therefore, while the 1992 Act represented a strong commitment to white collar CCT, the practical implications of that commitment did not require to be considered until after it had been enacted. The delay in issuing regulations defining the white collar services subject to CCT may therefore be ascribed to the fact that, unlike the six services initially subject to CCT under the 1988 Act, the Government failed to address the complexities of CCT for professional and administrative services, particularly those regarding the definition

⁶⁴ S8(2)(a) of the 1992 Act

⁶⁵ See Schedule 1

of services, until after the 1992 Act had been passed. Once again ideological commitment appears to have outstripped the consideration of practical issues.

The extension of CCT has not been confined to white collar services, however. In November 1994 three new blue collar services were added to the list of defined activities for the purposes of the 1988 Act: supervision of parking, vehicle management and security work⁶⁶. It is significant that almost six years had elapsed between the addition of management of sport and leisure facilities to the list of blue collar services subject to CCT under the 1988 Act, and the addition of these three services to the list of defined activities. The delay in extending CCT to new blue collar services may be attributed to two factors. First, it must be remembered that work under the 1980 Act, and the original six services under the 1988 Act were, according to the Government, by far the most significant blue collar services: once management of sport and leisure facilities was subjected to CCT, few significant blue collar services remained outwith the ambit of CCT. Secondly, and more importantly, the emphasis placed on white collar CCT focused attention away from the extension of CCT to new blue collar services: indeed, even after proposals emerged for the application of the 1988 Act's provisions to these three blue collar services, it is remarkable how little debate there was on the issue in comparison to the volume of comment on plans to extend CCT to any one of the white collar services. The delay in the extension of CCT to new blue collar activities can be attributed to a combination of these two factors.

The last interesting development regarding the extension of CCT is the decision not to bring corporate and administrative work⁶⁷ within the ambit of CCT. There were essentially two reasons for this decision⁶⁸. First, the fact that local authorities were themselves exposing many of their support services to competition, particularly where the users of these services were subject to CCT themselves

⁶⁶ Local Government Act 1988 (Competition) (Defined Activities) Order 1994 S.I. 2884

⁶⁷ This term essentially encompasses a diverse range of support services such as printing and building facilities management.

⁶⁸ See 1994-5 HC Debs Vol 250 cols 879-880w

and thus wished to keep overheads down: this had resulted in the private sector being extensively involved in the provision of these services. Secondly:

"...our objective of increasing competition in corporate and administrative support services is already being met through these means, and that extension of CCT to take this work would not bring sufficient additional benefits."⁶⁹

While this statement does not address the issue of definability, it is of interest in ascertaining the criteria presently applied to the extension of CCT to white collar services. It would appear from this statement that whether extensive use is made of competitive tendering on a voluntary basis, and in particular, the extent to which the private sector is involved in delivering a service is an important factor in determining whether a service will be brought within the ambit of CCT. Secondly, it appears that CCT will not be extended if it does not bring "sufficient additional benefits". In the light of previous Government statements regarding the benefits of competitive tendering, and in view of the fact that this statement refers to the use of market forces to keep overhead costs down, the "benefits" referred to are almost certainly the realisation of savings. If this is indeed the case, it is apparent that the realisation of savings has been the one constant in determining whether to extend CCT: this again raises the question why the Government set aside the PA Consulting report advising that there were few savings to be realised from white collar CCT prior to seeking the powers contained in the 1992 Act, and subsequently extending CCT to professional and administrative services.

Having examined the extension of CCT, it now remains to examine how the model of competition pursued by the Government has developed since 1992.

The development of the model of competition.

Central to the development of the model of competition pursued by the Government has been the Secretary of State's exercise of his

⁶⁹ Ibid.

powers under S9 of the Local Government Act 1992 to prescribe the behaviour of local authorities as anti-competitive. The statutory prohibitions of anti-competitive conduct, and the primary and subordinate legislation which attempts to define the circumstances in which those prohibitions will be violated, will be discussed in detail below⁷⁰. However, several salient features of the regime regarding anti-competitive practices must be discussed here.

The first thing to note about the prohibition of anti-competitive conduct is that it only applies to local authorities⁷¹, and does not, for example, prohibit private contractors from engaging in anti-competitive conduct. However, the general prohibitions contained in the 1980 and 1988 Acts did not define what would constitute anti-competitive conduct. To this end, the Secretary of State was given powers to regulate a variety of matters by S9 of the 1992 Act, and, most importantly, was endowed with the power to issue guidance defining what would, or would not, constitute an anti-competitive practice. The Guidance⁷² reveals much about the model of competition which the Government wishes to impose on authorities.

There are two particularly notable aspects to the Guidance. The first is the extent to which the Guidance seeks to redress the balance between the private sector and local authorities. Several aspects of the Guidance appear to go beyond simply ensuring fair competition and represent an attempt to assist the private sector⁷³. Nowhere is this more evident than in the treatment of the application of the Transfer of Undertakings (Protection of Employment) Regulations 1981⁷⁴. Even before the issue of the Guidance the Government believed that TUPE would not generally apply to CCT⁷⁵. When TUPE does apply, employees of a DSO or DLO which loses a contract to a private contractor must be transferred to that contractor on the same terms and conditions as they enjoyed

⁷⁰ See Part II, chapters 3, 4

⁷¹ See e.g. 1980 Act S9(4)(aaaa); 1988 Act S7(7)

⁷² See Doe Circular 10/93, Scottish Office Environment Department Circular 13/93. Welsh Office Circular 40/93

⁷³ See *infra*, Part II chapter 4 for a discussion.

⁷⁴ 1981 S.I. 1794

⁷⁵ See e.g. 1992-3 HC Debs Vol 212 col 670w; Vol 218 col 834

while employed by the local authority. However, as contracts are generally won by cutting pay and conditions⁷⁶, the likelihood of private contractors winning CCT contracts decreases if TUPE applies. Consequently, the Guidance attempts to preclude local authorities from pointing out that TUPE should be taken into account, and attempts to circumscribe closely the effect which it should have on the tendering process. This desire to ensure as far as possible that TUPE is not taken into account during the tendering process extends to the revision of the EC legislation on which it is based. Since it has become obvious that TUPE would generally apply to contracting out⁷⁷, the Government has attempted to ensure that any revision of the Acquired Rights Directive⁷⁸ would specifically exclude contracting out⁷⁹. The emphasis placed on attempting to evade the effect of a measure intended to protect the terms and conditions of workers illustrates two things about the model of competition which the government wishes to construct. First, as the alternative to the application of TUPE is that private contractors will inevitably seek to win a contract by undercutting the pay and conditions of workers, this lends support to the argument that the Government is primarily concerned with seeing contracts awarded to the lowest bidder. TUPE is concerned with the primarily social goal of safeguarding workers rights: if it does not apply to contracting out, then competitive tendering exercises can be determined on primarily economic criteria. If this is the case, private contractors will seek to undercut the pay and conditions offered by both local authorities and their other competitors. In such circumstances issues of quality become secondary to price. Secondly, the Government's attempts to have the Acquired Rights Directive amended in order to exclude contracting out illustrates that the Government, as far as possible, is committed to seeing that it alone

⁷⁶ See Walsh, *Competitive Tendering for Local Authority Services: Initial Experiences* (1991) para 12.18 et. seq.. See also Walsh and Davis *Competition and Service: The Impact of The Local Government Act 1988*, Chapter 14

⁷⁷ *Rask v ISS Kantineservice*, Case C- 209/81 [1993] IRLR 133; *Dr. Sophie Redmond Stichting v Bartol and Others* [1992] IRLR 366

⁷⁸ Dir. 77/187

⁷⁹ See Davis, 1993-4 HC Debs Vol 239 col 80w. See also: Germans bid to remove contracting-out from ARD, 15-21/7/94 *Municipal Journal* 6; Dobson, It's TUPE Jim, but not as we know it, 9-15/12/94 *MJ* 20

determines the model of competition, and will attempt to remove what it considers to be disruptive influences which lie outwith the competitive process which it seeks to dictate.

The second major point concerning the Guidance is that the legal propriety of many of its provisions can be called into question. In defining conduct as anti-competitive, the Government has quite often contravened not only provisions of the 1980 and 1988 Acts which can only be amended by statutory instrument made in accordance with the provisions of those Acts, but has also contravened the provisions of other statutes⁸⁰, and the EC public procurement regime; these matters will be discussed in detail below⁸¹. Given that the Guidance is permeated by provisions of questionable legal propriety, this would indicate that the Government has concentrated on merely exercising the power contained in S9 of the 1992 Act to define conduct which it perceives to be inconvenient to the private sector as anti-competitive without having due regard to the constraints of the wider scheme of legislation within which that determination must operate. Once again this illustrates the Government's ideological commitment to pursuing its own model of competition without fully considering the practical, or legal, consequences of doing so.

As has been noted above, however, the provisions of the 1992 Act must be viewed in their legislative context. The Local Government Act 1992 set in motion the process of local government reorganisation in England, a process which has been continued by the Local Government (Scotland) Act 1994 and the Local Government (Wales) Act 1994. These statutes have been central to attempts to redefine the role and structure of local government. As has been noted above the Government has recently attempted to redefine the role and institutional structure of government by reference to economic, as opposed to political, criteria: the 1992 and 1994 Acts are one manifestation of this process. A number of issues must be addressed in discussing local government reorganisation. First, the

⁸⁰ For example, one provision relating to the duties of councillors contravenes S33 of the Local Government and Housing Act 1989

⁸¹ See Part II chapter 4, which is dedicated to examination of the Guidance.

role envisaged for local government and the extent to which market-based techniques have played a part in determining the institutional structure of local government must be discussed. Secondly, the place of competitive tendering in the model must be considered.

The Enabling Authority and Local Government Reform

Central to the process of local government reorganisation which has been taking place since 1992 is the concept of the enabling authority⁸². However, what is meant by the "enabling authority"?

The current debate on the enabling authority can be traced to the pamphlet written by the late Nicholas Ridley when Secretary of State for Environment entitled *The Local Right: Enabling not Providing* ⁸³. There Mr. Ridley (as he then was) identified two major objectives of the local government policy of successive Conservative Governments since 1979: placing constraints on local authority expenditure and enhancing the standard of local government services which the public required. The two objectives could be pursued by local authorities concentrating on the public's requirements and wishes, improved accountability, the elimination of waste, duplication and unnecessary functions, and by improving value for money⁸⁴. In order to achieve the latter:

"Competition is vital to ensure value for money"⁸⁵

The pamphlet was primarily concerned with the future of local government. In outlining his vision of local government in the future, Ridley said:

"... I can foresee a much more diverse pattern of provision in the future by a variety of different agencies working alongside local authorities. The role of the local authority will no longer be that of universal provider. But it will continue to have a key role in ensuring that there is adequate provision to meet needs, in encouraging the various

⁸² See Heseltine, HC Debs Vol 202 cols 37-8

⁸³ Centre for Policy Studies, 1988

⁸⁴ *The Local Right: Enabling not providing*, p7

⁸⁵ *Ibid.* See also p8

providers to develop and maintain the necessary services, and where necessary in providing grant support or other assistance to get projects started, and to ensure that services are provided and affordable for the clients concerned.

"For other services, principally those of a regulatory kind, there may be less scope for diversity of providers, or for direct competition with the private sector. In these cases the impulse for competition and improved value for money will have to come from within the authority, from the stimulus provided by comparisons with other authorities, and from the investigations of auditors."⁸⁶

Local authorities, in Ridley's view, should move from being direct providers of services to being a guardian of the interests of service users, ensuring that services are provided, and stimulating the activities of other bodies to provide services⁸⁷. Competitive tendering has an important part to play in this process:

"... there is no reason whatsoever why the management of these services has to be 'political'. ... the emphasis shifts from the council as monopoly provider and manager to the council as enabler and monitor, and casts the spotlight on its role as the maintainer of high standards."⁸⁸

The concept of the enabling authority espoused by Ridley is thus one of a minimalist authority which seeks to utilise competitive tendering and agencies from outside the public sector, be they profit making or voluntary organisations, as much as possible to perform its functions⁸⁹. By utilising competitive tendering it seeks to ensure value for money and, as a corollary to that its judgement should reflect objective commercial criteria, not the use of political value judgements. In that respect, Ridley's conception of the enabling authority coincides with his oft-quoted ideal of a council being a body which would "meet once a year to award contracts, have lunch, and go away again for another year"⁹⁰.

⁸⁶ Ibid. pp 16-7. See also p18

⁸⁷ See also p25

⁸⁸ Ibid. p21

⁸⁹ Compare this with the concept of local government service provision contained in Forsyth, *Reservicing Britain*, Adam Smith Institute, 1981, discussed above Chapter 3

⁹⁰ Ridley, speech to a fringe meeting of the Conservative Party Conference 7/10/86

There are, however, several other views of what constitutes the enabling authority⁹¹, most notably that of Clarke and Stewart⁹². There are several points of similarity between Ridley's concept and that of Clarke and Stewart, whose work is probably the classic alternative approach to that of Ridley. Clarke and Stewart accept that the assumption that local authorities should automatically be service providers can no longer be adhered to⁹³. It is also accepted that the assumptions that local authorities should be self-sufficient in performing their responsibilities, provide a uniform service, and that service delivery should be provided around the traditional model of professional expertise available to authorities, can be challenged⁹⁴. The assumptions upon which this model is based, and particularly acceptance of the principle that services need not be provided directly, but via a variety of agencies is compatible with Ridley's concept of the enabling authority.

While points of similarity exist between the two models, they diverge on two very important points. The first is that Clarke and Stewart's model is much more community-based than Ridley's. Whereas Ridley envisaged the enabling authority as a form of competitive council which generally contracts for services in accordance with objective commercial criteria, Clarke and Stewart's model draws much more on European experience. In this regard it is similar to yet another model of the enabling authority which emphasises the role of active citizenship and empowering the local community to play a more active role in its own affairs⁹⁵. In leaving the local community to make decisions about its own needs and the means by which they are fulfilled, value judgements would inevitably be made, which may not always be compatible with

⁹¹ See e.g. Brooke, *The Enabling Authority* [1991] 69 *Public Administration* 525; Brooke, *Enabling Optimism* 18/8/89 LGC 24; Gyford, *The Enabling Council - A Third Model* (1991) 17(1) *Local Government Studies* 1

⁹² See e.g. *Choices for Local Government* (1991); *The Future for Local Government: Issues for discussion* [1990] 68 *Public Administration* 249; *Conflicting views of an Enabling Authority* 14/7/89 LGC 17

⁹³ *Choices for Local Government* pp.-9, 10-1

⁹⁴ *Ibid.* p8

⁹⁵ See Gyford, *op. cit.* fn 63

Ridley's pursuit of value for money via the application of objective commercial criteria.

The second point of divergence between Ridley's model and Clarke and Stewart's model of the enabling authority is the latter's commitment to:

"The possibility of establishing the enabling role in the fullest possible sense. Enabling the community to meet its needs and problems in the most effective way can be given expression in a power of general competence."⁹⁶

As there are fundamental differences between this model and Ridley's, and given that central to Clarke and Stewart's concept of the "enabling authority" is the existence of a power of general competence, then what they are really discussing is not the "enabling authority" but the enabled authority, which is empowered to make a variety of choices as to the nature of service delivery by virtue of that power of general competence.

It is not surprising that Clarke and Stewart's concept of the enabling authority has played little, if any, part in the present administration's attempts to restructure local government in England, Scotland, and Wales. The Government's commitment to a model of the enabling authority akin to Ridley's was evident in a statement made to the Commons in April 1991 by Michael Heseltine which identified why a review of the two-tier structure of local government required to be re-examined:

"...the Government are committed to developing the concept of enabling authorities. Councils will increasingly be able to take advantage of competition between those seeking to provide a service."⁹⁷

The concept of the enabling authority which Heseltine espoused here owes much to his predecessor given the prominent part played by competition. In accordance with Ridley's concept it would be the

⁹⁶ Clarke and Stewart, *op. cit.* p26. The possibility of a power of general competence had, interestingly, been discussed some years earlier in Loughlin, *The Restructuring of Central- Local Government Relations* (1985) 11(6) *local Government Studies* 59

⁹⁷ 1990-1 HC Debs Vol 189 col 801. See also col 808

legal conduit for service provision, rather than the direct provider of services.

The Local Government Act 1992 marks the first legislative attempt to give effect to the concept of the enabling authority. However, unlike the Local Government (Scotland) Act 1994, and the Local Government (Wales) Act 1994, which established unitary authorities, the 1992 Act established the Local Government Commission in order to determine the future structure of local government in England. However, while the process of local government reorganisation may have differed in England, the approach taken by the Government is still revealing. It was apparent that the Government wished to move away from attempting to define the structure of local government by reference to its role and the functions it is required to carry out, and instead wished to see considerable emphasis placed on the manner in which those functions can be performed. The application of political criteria in order to determine what should be the role of local government, and the functions which it should possess, are increasingly being replaced by economic criteria regarding the performance of those functions. Baroness Blatch, Government Spokeswoman in the Lords, stated that:

"There must be proper justification for the inevitable upheaval and costs involved in reorganisation. Any change to structure should be both worth while and cost effective.

"The Local Government Commission should consider the costs and benefits of change and the economy and effectiveness of service arrangements. It will be able to obtain advice from other expert organisations, in particular the Audit Commission, to assist it in its work. The Audit Commission will be able to advise the Local Government Commission on the likely impact of any proposed structural changes on the economy, efficiency and effectiveness of service provision."⁹⁸

The Government's position was stated more succinctly by Michael Heseltine when he stated in the Commons that, in the draft guidance to the Local Government Commission, "we have placed considerable weight on the need to demonstrate that there is an economic case

⁹⁸ 1991-2 HL Vol 532 col 712

for change"⁹⁹. Mr. Heseltine further emphasised the role of the Audit Commission in the process of reorganisation¹⁰⁰.

It would therefore appear that it was the Government's intention that local government should be reorganised in accordance with economic criteria, primarily those of economy, efficiency and effectiveness. The aim of the process of reorganisation was stated by Michael Heseltine during the Second Reading debate on the Local Government Bill:

"The Bill is about preparing local government for the 21st century. It involves the extension of competitive tendering, which will continue the disengagement of local authorities from direct service provision and will promote their strategic and enabling roles."¹⁰¹

It is clear from this statement that the Government's ideal is a contracting authority buying its services, in which competitive tendering plays a crucial role. Hence the emphasis on the use of economic criteria to determine the shape of local authorities after reorganisation; they are, quite simply, intended to be not only the optimal size for efficient service delivery, but also the optimal size for the operation of competitive tendering and purchasing of services. The pursuit of value for money, and the use of competition, was not merely to be used to determine the manner in which local authorities perform their functions, but was also to be used as a factor in determining the structure of those authorities.

The enabling authority was also intended to be a unitary authority¹⁰². This aim was achieved in Scotland and Wales by primary legislation¹⁰³. However, Part II of the Local Government Act 1992 essentially placed the task of determining the future structure of local government in England in the hands of the Local Government

⁹⁹ 1991-2 HC Debs Vol 202 col 37

¹⁰⁰ Ibid. col 19

¹⁰¹ Ibid. col 37

¹⁰² See e.g. *Shaping the Future - The New Councils*, Scottish Office Environment Department, Cm 2267, Foreword, p4

¹⁰³ See Local Government Etc (Scotland) Act 1994; Local Government (Wales) Act 1994

Commission. The Commission did not recommend the establishment of unitary authorities across England, as the Government would have desired, but instead recommended the retention of a two tier system of local government for the greater part of the country, and the creation of unitary authorities in the minority of areas which it considered. However, the Government, having had its desire to see the adoption of unitary authorities across England stifled by the very body which it had created for that purpose, waited until the Commission had completed its review and, in effect, rejected the recommendations which the Commission had made, announcing that new Commissioners would be appointed to re-examine the future structure of local government in relation to a number of significant areas of population¹⁰⁴. This not only prolongs the process of local government reorganisation, but illustrates the Government's commitment to this model of local government.

As has been noted above, the redefinition of government is not a process which has been confined to local government, and must be viewed in the context of wider initiatives to reform the role and structure of government in recent years.

Conclusions

Government policy on the extension of CCT has shown little consistency or innovation since the 1988 Act was passed. Having initially appeared to step back from imposing CCT on professional and administrative services on account of the fact that it considered that insufficient savings would be realised, and that such services were not sufficiently definable, the desire to extend compulsory competitive tendering to professional and administrative services became almost an obsession from 1991 onwards. However, once again, it would appear that ideological commitment outstripped practical consideration of the issues involved. In spite of local government professionals, and, more importantly, the Government's own consultants pointing out that there would be problems in defining the white-collar services which would be subject to competition, and expressing scepticism about the savings to be

¹⁰⁴ The review roller coaster starts again, 3/3/95 LGC 1

realised, the Government committed itself from mid-1991 onwards to the extension of CCT to white collar services: in doing so it departed from its previous policy. To this end it sought the powers contained in S8 of the Local Government Act 1992 in order to establish tendering regimes for various professional and administrative services: these powers were never brought into force, however. The Government has thus had to rely on the powers contained in the Local Government Act 1988. The considerable delay in defining the first white collar services which will be subject to CCT would tend to indicate that the Government has failed to fully appreciate the complexities involved in doing so. Moreover, the Government's concentration on the extension of CCT to white collar services has resulted in blue collar services being relatively neglected: almost six years elapsed between management of sports and leisure facilities being added to the list of defined activities contained in the 1988 Act and the addition of the next manual activity. The Government's commitment to extending CCT to new services, particularly white collar services, has been increasingly obvious: however, the criteria it has applied in doing so have often lacked coherence, and the neglect of blue collar services also raises major questions about the coherence of the policy of extending CCT to new services.

The other major element of the Government's policy on CCT has been the construction of the model of competition to be applied. This has largely been achieved, since 1992, by the issue of Guidance pursuant to S9 of the 1992 Act. However, as will be seen¹⁰⁵, the model of competition expressed in the Guidance is largely designed to remedy practices which are perceived to be prejudicial to the prospects of private sector contractors winning contracts. Moreover, in attempting to remedy the perceived imbalance between the private sector and local authorities, the Government has sought to impose a model of competition by means of subordinate legislation issued under S9 of the 1992 Act¹⁰⁶ which is often at variance with the statutory regime which it is apparently intended to ensure

¹⁰⁵ See Part II Ch. 4

¹⁰⁶ This provision, and the web of subordinate legislation surrounding it, will be discussed below: see Part II, Chapters 3,4

compliance with, and which often contravenes EC legislation which the Government is under a duty to implement. It would thus appear that the Government is more committed to imposing its own model of competition than it is to ensuring that its actions comply with the parameters of the legal regime which it has established, and with its own wider legal obligations.

It has become increasingly obvious, however, that the use of competitive tendering is but one element of a set of policy initiatives which is intended to result in not only the way in which services are delivered being reviewed, but also the scope of government and the structure of governmental agencies being redefined. The process of local government reform in recent years has seen the Government imposing unitary enabling authorities in Scotland and Wales, although attempts to do so in England have proved less successful. A corresponding process in central government has seen the Government attempt to divest itself of those functions which it considers to be unnecessary, privatising others which it does not believe need to be provided by government, the increased use of market testing, and the progressive creation of Executive Agencies. The process of restructuring both central and local government has been justified by reference to the criteria of economy, efficiency and effectiveness: the government has been attempting to ensure value for money in the provision of services. However, one must be cautious about defining the role and structure of government by reference to potentially inappropriate economic criteria: governmental agencies do not operate in a political vacuum, and greater recognition must be given to the fact that they exist to give effect to political policies.

Hitherto this study has been concerned primarily with the development of Government policy on competitive tendering and contracting out, and has sought to consider those developments in the context of wider initiatives to restructure the institutions and role of both central and local government. However, while the development of the legislation establishing compulsory competitive tendering for local authority services has been considered, the provisions of the statutory scheme have not been considered in great

detail. Therefore, the next Part of this study will be devoted to a detailed evaluation of the relevant provisions of Parts I and II of the Local Government Act 1988 and Sections 8 to 11 of the Local Government Act 1992.

PART II
CHAPTER I

A MATTER OF TWO REGIMES: THE SERVICES SUBJECT TO CCT,
AND THE EUROPEAN DIMENSION

As was seen in Part I the legislation relating to compulsory competitive tendering in the United Kingdom has evolved over a long period and, at times, its development has appeared to lack coherence. In this Part we must now turn to a detailed legal analysis of the provisions of the Local Government Act 1988 and the Local Government Act 1992. This requires not only an examination of the provisions of the statute and relevant delegated legislation, but also an assessment of the compatibility of the domestic legislation, and practice of compulsory competitive tendering, with the EC public procurement regime and, in particular Dir. 92/50 which co-ordinates the procedures for the award of public services contracts.

The intention of this research is to concentrate on competitive tendering for services. There will be no discussion of CCT for works of construction and maintenance, which falls within the ambit of Part III of the Local Government, Planning and Land Act 1980. Moreover, there will be no consideration of the requirement of S135 of the Local Government Act 1972 and S89 of the Local Government (Scotland) Act 1973 that local authorities should make provision in their standing orders for competitive tendering as regards the supply of goods and the execution of works. This provision has become increasingly obsolete as the ability of local authorities to establish their own procedures for the award of contracts has been eroded by the promulgation of new procurement regimes at both domestic and European level. Thus, insofar as the execution of works is concerned, award procedures will be regulated by Part III of the Local Government, Planning and Land Act 1980 and Directive 93/37, while the procurement of supplies will be regulated most significantly by Directive 93/36, which establishes a parallel regime to those regulating public works and services¹. If, for

¹ Dir. 93/36 has now been transposed into national law by the Public Supply Contracts Regulations 1995 S.I. 201. The Public Works and Services Directives have been

example, building maintenance work is proposed to be retained in-house, the award of such work clearly now falls within the scope of the 1980 Act². In all other instances originally envisaged as falling within the 1972 and 1973 Acts, however, provided that the relevant threshold values are exceeded, tendering will be regulated by the relevant European Community awards procedures as transposed into domestic law³: the absence of statutory provisions akin to those contained in the 1980 Act and the Local Government Act 1988, aimed at regulating award procedures, places consideration of that part of the topic of public procurement in local government outwith the scope of this research.

Secondly, this chapter is intended to be devoted to the general scope of the domestic legislation and to establishing the extent to which the EC procurement directives apply: while this will entail a detailed examination of Part I of the 1988 Act and sections 8 to 11 of the 1992 Act, thorough consideration of the broad framework of the tendering regime will be deferred to a subsequent chapter⁴. It is necessary to establish at this stage the extent to which the public procurement regime applies in the same circumstances as the 1988 and 1992 Acts in order that the legal propriety of the domestic tendering regime can be assessed more thoroughly and effectively against the objective standards set by the EC regime. Moreover, as the prohibition of anti-competitive conduct contained in the domestic legislation permeates all aspects of the tendering regime, this concept is clearly of such a fundamental nature that it merits extensive consideration in its own right⁵. Similarly, the powers reserved to the Secretary of State by S13 and S14 of the 1988 Act will be considered in a separate chapter, primarily due to the fact that these provisions are intended to address the behaviour of local authorities not only during the tendering process, but also during the period of performance of the work awarded to Direct Services

transposed by the Public Works Contracts Regulations 1991 S.I. 2680 and the Public Services Contracts Regulations 1993 S.I. 3228

² See Part I Chapter 3 for a discussion

³ Part II of the 1988 Act, relating to non-commercial considerations, will also be of relevance: see chapter 6, *infra*

⁴ See e.g. Chapter 2 for an outline of the tendering regimes

⁵ See Chapters 3 and 4 for an explanation.

Organisations⁶. The non-commercial considerations regime contained in Part II of the 1988 Act must also be considered at length in a subsequent chapter⁷ as its provisions are intended to permeate all aspects of local government procurement and are thus of considerable relevance. The final chapter in this Part will be dedicated to examining the contracts which result from the award procedures, and pose the question whether we are witnessing the emergence of a public, or administrative, law of contract.

Given that much of the legal analysis which is to follow is essentially an assessment of the compatibility of the domestic legislation regarding compulsory competitive tendering with the EC Services Directive, it is first necessary to ascertain whether that Directive applies in the peculiar circumstances of, and to the activities covered by the Local Government Acts 1988 and 1992.

DOES THE EC SERVICES DIRECTIVE APPLY IN THE CIRCUMSTANCES OF CCT ?

The EC Directive which is ostensibly of most relevance in assessing the provisions of domestic legislation on compulsory competitive tendering is Dir. 92/50 relating to the co-ordination of procedures for the award of public service contracts; the scope of this Directive corresponds closely to the services regulated by the Local Government Acts 1988 and 1992⁸. However, there is one apparent difficulty with the application of the public procurement Directives to CCT as established by the 1988 and 1992 Acts. A problem arises as a result of the scheme of the domestic legislation, which attempts to ensure that "local and other public authorities undertake certain activities only if they can do so competitively"⁹; the various statutes require competitive tendering only where it is proposed to perform work in-house, or via another authority's DSO. The former

⁶ See Chapter 5

⁷ See Chapter 6

⁸ The extent to which the scope of the activities regulated by the Directive and the relevant domestic legislation correspond will be discussed below.

⁹ See the long title of the Local Government Act 1988. The relevant legislative provisions will be discussed in detail below.

is by far the most common situation¹⁰. The received wisdom is that since the work is to be performed in-house no contract exists¹¹. The European directives, however, are based on the existence of a contract, the preamble to Directive 92/50, for example declaring, that:

"...the provision of services is covered by this Directive only so far as it is based on contracts; whereas the provision of services on other bases, such as law or regulations.....is not covered"

The requirement that there should be a contract thus raises questions about the scope of the Directive's application where work is awarded to a DSO following the application of the relevant CCT legislation. The question which has occasionally been posed by some commentators is whether there can be an "award" of a contract for the purposes of the Directive when no contract exists in domestic law?¹²

Two questions must be asked in examining the obstacle to the application of the directives which this analysis ostensibly represents. First, one must examine the Directive and ask whether they impose their own concept of what constitutes a public services contract, and whether the arrangements arising from the CCT legislation can satisfy this concept? Secondly, contrary to the received wisdom, can an agreement that an in-house service unit should perform work constitute a contract as a matter of domestic law?

¹⁰ The most recent INLOGOV report into the progress of CCT, *Competition and Service : The Impact of the Local Government Act 1988* (1993), reveals that the vast majority of work subject to the 1988 Act's provisions was retained in-house, with only 22.2% of all work tendered for being won by "external" contractors. See in particular Chapter 7 of the report.

¹¹ See, for example, Harden, *Defining the Range of Application of the Public Sector Procurement Directives in the United Kingdom*, 1992 P.P.L.R. 362 at pp 369-371, Cirell and Bennett, *Problems Begin To Emerge Under Competitive Tendering*, 21 July 1989 Loc. Govt. Chronicle 14

¹² See for example Cirell and Bennett, *Clash of Regimes* 25/9/92 LGC 12; Cirell and Bennett, *Compulsory Competitive Tendering: Law and Practice* (2nd Ed.) 21.33-34; Harden, *Defining the Range of Application of the Public Sector Procurement Directives in the United Kingdom* [1992] 1 P.P.L.R. 362 at pp 370-1

While the preamble to the Services Directive states that it applies only insofar as the relevant activity is performed under a contract, the corpus of the Directive defines what will constitute a contract for its purposes. Article 1(a) of the Services Directive (92/50) states that:

"public services contracts shall mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority "

The definition of a "contracting authority" includes a local authority¹³. The Directive, therefore, requires the existence of several essential elements for an agreement to fall within their scope.

First there must exist a contract for pecuniary interest. Two observations can be made regarding this condition. First, it is interesting to note that the regulations transposing the Directive into national law do not speak of "contracts for pecuniary interest", but rather of contracts "for consideration (whatever the nature of the consideration)"¹⁴. One must, however, ask what precisely is meant by "pecuniary interest". If all that is envisaged is a simple transfer of funds from one accounting entity to another, then the 1988 Act's provisions may provide a solution which will satisfy this element of the test. The 1988 Act requires that not only must a DSO which wishes to perform work produce a written bid indicating its desire to do so¹⁵, and perform the work in accordance with the detailed specification prepared as part of the tendering process¹⁶, but also that, by virtue of S9(2) and (4), it is required to keep accounts relating to the performance of each description of work. The effect of the legislation is to identify a DSO as being a separate accounting entity from the local authority for which it performs the work: the legislation necessitates the creation of client and contractor responsibilities. The separation of client and

¹³ Article 1(b) , see also S.I. 1993 3228 Reg. 3 as regards the definition of "local authority" once the Directive is transposed into national law. This encompasses all of the bodies defined as local authorities by S1 of the Local Government Act 1988

¹⁴ See S.I. 1993 No. 3228 Reg. 2(1)

¹⁵ S7(6)

¹⁶ S7(8)

contractor as a result of the 1988 Act in particular has been well documented¹⁷. In effect the legislation, and the practice which has evolved¹⁸, means that a local authority transfers funds to its DSO for the performance of work or services subject to CCT¹⁹. If all that is required by the "pecuniary interest" test is an allocation of funds to the entity performing the work, then this should suffice. This, however, leaves the two other elements of the test to be satisfied; namely the requirement that the contract should be in writing, and that there must be a contracting authority and a "service provider". The latter will be dealt with first.

The Directive in question operates when there exists a "contracting authority", which, as we have seen, includes a local authority, and a "service provider". The definition of a "service provider" for the purpose of Dir. 92/50 can be dealt with quite succinctly. Article 1(c) states that:

"*service provider* shall mean any natural or legal person, including a public body, which offers services."

Does a DSO bidding for work under the Local Government Acts 1988 and 1992 fulfil this definition? Certainly a DSO derives such personality as it possesses from its parent authority, or alternatively it may have become part of a local authority controlled company formed under the provisions of Part V of the Local Government and Housing Act 1989, in which case it will be a distinct legal person²⁰. Where a DSO has not been established as a company by virtue of the 1989 Act's provisions, the conventional view is that DSOs are formed to facilitate the performance of their parent authority's functions and that their existence can therefore

¹⁷ See in particular INLOGOV, *Competitive Tendering for Local Authority Services: Initial Experiences* (1991), *Competition and Service: the Impact of the Local Government Act 1988* (1993).

¹⁸ For example the creation of autonomous DLO trading accounts; see INLOGOV (1991) para 8.25-28, (1993) chapter 8

¹⁹ This position is further emphasised in Scotland by the provisions of S 163 of the Local Government (Scotland) Act 1994 which regulates the surpluses of DSO and DLO accounts. There is as yet no equivalent provision in England or Wales

²⁰ Note that S33 of the 1988 Act provides that where DSOs are formed into companies the parent authority must take "reasonable steps for the purpose of securing competition for the carrying out of that work"

be justified by reference to the powers contained in S111 of the Local Government Act 1972 and S69 of the Local Government Scotland Act 1973²¹. DSOs would therefore appear to possess some form of legal personality, derivative though this may be. It is, moreover, if not a "public body" per se, at least part of a public body. The other element of this definition, namely that the service provider should "offer services" is easily satisfied. A DSO exists solely to provide services, and as a consequence of the 1988 and 1992 Acts, is compelled to offer its services periodically to a contracting authority (albeit its parent authority) in the course of a tendering exercise. It is noteworthy that a local authority can fulfil the definition of a contracting authority and simultaneously, via its DSO, fulfil the definition of a service provider for the purposes of Dir. 92/50.

One may also wish to construct an argument based on the Public Services Contracts Regulations²², which transpose Dir. 92/50 into national law. Regulation 4(1) defines a service provider as being:

".....a person-

- (a) who sought, or who seeks, or would have wished,
(i) to be the person to whom a public services contract is awarded, ...

...and

- (b) is a national of a member state."

Further light is shed on the definition of "contractor" by regulation 21(9), which states that :

"For the purposes of this regulation an "offer" includes a bid by one part of a contracting authority to provide services to another part of a contracting authority when the former part is invited by the latter part to compete with the offers sought from other persons"

The latter regulation would appear to be conclusive as to whether an in-house operation can make an offer to perform work, and consequently be awarded a contract, but has caused difficulties to those commentators who find themselves trapped by the orthodox

²¹ This argument is favoured by Cirell and Bennett, op. cit. 0.3

²² 1993 S.I. 3228

view that if work is retained in-house it cannot represent a contract: it has even been contended that while an in-house operation may submit an offer there may be no award because there can be no contract; instead work would be technically withdrawn from competition and no award notice would be necessary, although it is almost simultaneously (and inconsistently) submitted by the same authors that as the courts would have to apply a purposive interpretation of the regulations, it would be held that an award would have been made²³.

This position fails to take into account one important factor. Much stock has been put on the fact that an "award" is defined by reg. 2(1) as meaning "to accept an offer made in relation to a proposed contract"²⁴: confusion consequently exists as to the effect of the regulations upon the award of work in-house as this is not perceived to fulfil the classic contractual model. However, such an analysis fails to take account the precise wording of Reg. 2(1), which does not define an award in terms of a concluded contract, but instead refers to a "proposed contract". As a "proposed contract" is merely a putative contract, and possesses no legal form, the fact that it lacks certain of the essentials of a concluded contract is irrelevant. Thus the award of work in-house can constitute an "award", even though the received wisdom is that it cannot constitute a contract. Consequently, as Reg. 21(9) declares that, for the purposes of Reg. 21 (which deals with the criteria for the award of a public works contract), an offer includes a bid by one part of a contracting authority for the works of another part then an "award" can be made as the acceptance of such an offer will result in a "proposed contract", even if all of the essentials of a concluded contract are not fulfilled. It is therefore arguable that, as a DSO, like any in-house operation, possesses no legal personality distinct from its parent authority²⁵, it will derive such personality as it possesses

²³ Cirell and Bennett, *Compulsory Competitive Tendering: Law and Practice* (2nd Ed.), 21.34-5, discussing the Public Works Contracts Regulations 1991 S.I. 2680, the provisions of which are practically identical. It is also pointed out at 21.35 that an award notice would be required by virtue of regulation 22(4) on the grounds that no contract is awarded.

²⁴ *Op. cit.* 21.33-4, discussing the identical provision of the Works Regulations

²⁵ See *Kershaw v City of Glasgow D.C.* 1992 SLT 71 at 72 K; *Woodland v South Somerset D.C.* 2/95 unreported

from the organisation which it performs work for, and is part of, and may thus fulfil the definition of a service provider contained in Reg. 4, by virtue of the fact that it has "sought ... to be the person to whom a public works contract is awarded".

The final element of the test is to ascertain whether the test regarding the application of Dir. 92/50 is that the "contract" should be "in writing". If we accept that the arrangements between a local authority and its DSO are capable of being a form of agreement which fulfil the other elements of the test, then this element is relatively easily satisfied. The practice of compulsory competitive tendering in the UK is that the specification of the work to be put out to tender is essentially a draft of the contract for the performance of that work²⁶. Thus once the tendering procedure is complete, all that remains to be done is to fill in to spaces left blank on the draft contract such items as the identity of the successful tenderer, and the price, for example. This is no less the case where the successful bid has been made by a DSO as where a private contractor has succeeded²⁷. The respective rights and duties of the client authority and the contractor (be it in-house or selected from the private sector) are thus set out in writing as a matter of practice.

It would therefore appear that the law and practice of compulsory competitive tendering have evolved in a manner which would bring the situation where work is awarded in-house in accordance with the 1988 and 1992 Acts within the scope of the corresponding Directive. This assertion is the result of a textual analysis of the Directive which ultimately challenges the received wisdom that an agreement between a local authority and one of its in-house agencies cannot, as a matter of domestic law, be a contract. It has been the case that commentators have questioned the extent of the Directive's application by reliance on the principle that natural or legal persons cannot contract with themselves when acting in the

²⁶ Indeed, where a DSO is to perform the work, S7(8) of the Local Government Act 1988 requires that "in carrying out the work the authority comply with the detailed specifications of it".

²⁷ Information gleaned from interviews conducted with officers of Strathclyde R.C. 1/12/93, 30/3/95, and of Stirling D.C. 19/4/94, 10/5/95

same capacity ²⁸. However, has too much faith been placed in this principle? Does it apply in every conceivable situation?

The generally accepted position is that there must be either at least two parties to a contract, or that a man may only contract with himself if he is endowed with two distinct legal capacities²⁹. If this classic exposition of domestic law is accepted unquestioningly, then one can indeed cast aspersions upon whether a DLO or DSO can conclude a contract with the same local authority from which it derives its limited legal personality. However, there is authority which supports the proposition that, for certain purposes at least, a contract may be concluded between distinct parts of a broader institutional structure.

The case of *Bremer Handelsgesellschaft m.b.H. v Toepfer* ³⁰ gives support to the proposition that in appropriate circumstances two distinct parts of the same legal entity may enter into an agreement which can be characterised as being a contract. This case came before the courts when the Board of Appeal of the Grain and Feed Traders Association referred this arbitral award to the High Court (Queens Bench Division) by way of a special case in order to determine *inter alios* whether a contract did exist where, in the course of a series of transactions culminating in the sale of soya bean meal to Toepfer, two of Bremer's offices had entered into agreements with each other on the basis of GAFTA's standard form of contract. It was averred that the two offices in question, namely those situated in Hamburg and Munich, were autonomous and were in the habit of trading with each other as if they were distinct legal entities. In the course of the transaction at issue one office had bought soya bean meal and sold it to the other office. The question therefore arose as to whether each office could fulfil the definition of "subsequent sellers" for the purposes of the relevant GAFTA standard form of contract. It was held that they could.

²⁸ See footnote 11

²⁹ See for example *Rowley Holmes & Co v Barber and another*, [1977] 1 All ER 801 (Executor contracted with himself in an individual capacity), *Lee v Lee's Air Farming Ltd* [1960] 3 All ER 420 (Held that a man acting as a company's governing director could contract with himself as an individual)

³⁰ [1980] 2 Lloyds L.R. 43

At first instance Donaldson J (as he then was) opined that the existence of a genuine arms length trading transaction between the two offices was crucial³¹. Furthermore he observed that :

"It is certainly the case that neither the law nor the Courts nor, for that matter, any merchant, would recognise an agreement as a 'contract' if that agreement was made by an individual with himself. The idea of an individual bargaining with himself at arm's length is a physical, commercial and legal absurdity. But it is not so absurd when one comes to consider an artificial person, who may have more than one directing mind. Nor is it so absurd in the context of organisations, such as trade unions, which have many sections and branches."³²

In applying this reasoning to the circumstances of the case and the terms of the contract, Donaldson J concluded that:

"My concern is with a contract between sellers and a buyer who are distinct legal entities. The problem is whether *that* contract contemplates that there may be a string of contracts including 'contracts' between the Munich office and the Hamburg office. I think that it does, so long as those contracts are what the trade would regard as genuine arm's length trading transactions. That is the case here..."³³

The Court of Appeal appears to have applied a slightly different approach from Donaldson J, with Megaw LJ emphasising the orthodoxy that a man cannot contract with himself³⁴. However, Megaw, Lawton and Browne LJJ did agree with Donaldson J that the agreements between the two offices were genuine trading transactions³⁵. In his leading judgement Megaw LJ observed that:

"...whatever might be the ordinary meaning of the word 'contract', and whatever might be the meaning in other contexts of the words 'first buyer' or 'subsequent seller', nevertheless, against the background of a recognised practice which was found by this trade arbitration tribunal, the sellers were to be treated in this contract as 'subsequent

³¹ [1978] 1 Lloyds L.R. 643 at p650, 651

³² [1978] 1 Lloyds L.R. 643 at pp 650-1

³³ Ibid. p651

³⁴ [1980] 2 Lloyds L.R. 43 at p44, p47.

³⁵ See Megaw LJ ,ibid. pp 44, 47; Lawton LJ p50; Browne LJ p 50,51

sellers' for the purpose of that clause. That was the decision of the Board of Appeal. That was the view which was taken by the learned judge in the Commercial Court..."³⁶

In spite of Megaw LJ's earlier adherence to the classical contractual model (which is arguably at variance with certain elements of the judgement of Donaldson J which the Court of Appeal purported to uphold) he nevertheless accepts in his opinion that an agreement between two parts of the same organisation can, in limited circumstances, be a "contract". However, it can only be characterised as such if it can derive its authority from some higher legal order (in the instant case this was achieved by reference to the GAFTA standard form of contract which was the common basis for all transactions), if the transaction between both parts of the organisation is a "genuine trading transaction" (i.e. each part of the organisation treats the other as if it is a separate business entity and trades with it on the same basis as it transacts with truly distinct legal persons)³⁷, and if the existence of such agreements is recognised by the established practise of the business or trade in question. The major limitation on such "contracts", however, is that they can only be viewed as contracts as regards third parties: they are not enforceable as between the two parts of the single legal entity, presumably because, by adherence to the classical contractual analysis to which Megaw LJ refers, questions of frustration of contract arise due to the fact that there is only one legal person involved in the agreement³⁸.

Both the "genuine trading transaction" test, referred to by Donaldson J and which the Court of Appeal concentrated upon, and the postulation of Donaldson J that autonomous parts of the same artificial legal person could enter into a contract with each other, are capable of providing support for the proposition that the arrangements resulting from the operation of CCT legislation can be characterised as being contractual as a matter of domestic law and thus fall within the scope of the public procurement directives. The "genuine trading transaction" test will be discussed first.

³⁶ Ibid. p48

³⁷ See fn 33

³⁸ Ibid. p44

The agreements reached between local authorities and their DSOs would appear to fulfil the three elements of the genuine trading transaction test for a variety of reasons. First, such agreements derive their authority from a higher legal order; namely the statutory scheme within which CCT is conducted. DSOs must now enter into agreements to perform work on the same basis as external contractors do on account of the fact that agreement is reached on the basis of a common specification³⁹. This would appear to overlap with the second and third elements of this test, namely that there should be a genuine trading transaction, and that the existence of such transactions should be part of recognised trade practice. There is much evidence relating to the development of the client-contractor split in local authorities as a necessary corollary to the demands of the CCT legislation⁴⁰. However, the client-contractor split during the course of the competition process is now required by statute⁴¹: thus the question of ascertaining accepted business practice⁴² no longer arises as statutory regulation necessarily supersedes the prior, extra-statutory, practice in setting the minimum standards of acceptable behaviour. As a consequence of the establishment of the client-contractor split, and the Secretary of State's powers to police anti-competitive conduct⁴³, local authorities must deal with their DLOs as if they are separate legal entities up to the point at which it is decided that the in-house team should perform the work. Thus the arrangements arising from the operation of the CCT legislation are genuine arms-length trading transactions recognised by the legislative scheme itself due to its formal separation of the client and contractor

³⁹ See Chapters 2, 4, *infra*, on this point. Indeed it would appear that the aim of the guidance on anti-competitive conduct is to ensure that this is achieved; see chapter 4.

⁴⁰ See especially Walsh, *Competitive Tendering for Local Authority Services: Initial Experiences*, DoE 1991, chapters 7, 8, 9; Walsh, Davis, *Competition and Service: The Impact of the Local Government Act 1988*, DoE 1993, Chapters 1-4, 6.

⁴¹ See Local Government (Direct Service Organisations)(Competition) Regulations 1993, 1993 S.I. 848, reg 4. The precise implications of this regulation will be discussed *infra*

⁴² It would appear however that as a matter of practice local authorities do apply a more stringent client-contractor split than the regulations require; interview with officers of Stirling DC 19/4/94, 10/5/95

⁴³ On anti-competitive conduct see CHs 3, 4; Ch 5 will discuss the Secretary of state's powers regarding the policing of such conduct.

functions: if work is awarded to a DLO other than in the course of a genuine arms-length transaction then the award will be considered to be anti-competitive, and the Secretary of State may attack the award of the work to the DLO⁴⁴. The client-contractor split, however, continues after the award of work, as is evidenced by the fact that the client side of the authority is continually involved in monitoring the DLO's performance of the contract⁴⁵. Agreements between local authorities and their DSOs can therefore be characterised as "genuine trading transactions", primarily because of the manner in which the statutory scheme prescribes that they must be entered into. Such transactions can therefore be characterised as being "contracts", at least as far as third parties are concerned, and thus will in principle fall within the scope of the public procurement directives.

The second test, postulated by Donaldson J, but not directly addressed by the Court of Appeal, is quite attractive due to its simplicity and the ease with which it fits the pattern of CCT; the Court of Appeal's failure to consider this test arguably marginalises its value, however. Basically Donaldson J postulated that where one was considering the activities of two autonomous parts of an artificial legal person, both of which conducted their affairs at arms length from the parent organisation, it may be possible for a legally enforceable contract to be formed between the autonomous arms of the organisation in the course of business. In considering the position of local authorities, one is undoubtedly presented with an artificial legal person, each one being either a creation of statute, or, in a few cases, the grant of a royal charter. Moreover, as was noted above, the client-contractor split has certainly resulted in local authorities having "more than one directing mind" regarding those services subject to CCT. The fact is that, as a result of CCT, DSOs in particular, have found themselves forced to operate at arms length from their parent authority not merely because of the overt requirements of the CCT regime regarding the conduct of the competition process, but also because of the wider implications of

⁴⁴ See Ch 3 *infra* for a discussion of the relevant Regulation

⁴⁵ See Walsh and Davis, *Competition and Service: The Impact of the Local Government Act 1988*, Ch 9 for an insight into the process of contract monitoring.

the statutory scheme. Thus the establishment of trading accounts and the requirement to meet financial targets⁴⁶, have resulted in DSO managers realising that they must develop business strategies for the survival of their particular Organisation in the harsh environment of CCT⁴⁷. Moreover, the parent authorities often go further than the statutory scheme demands, by endeavouring to deal with their DSOs as if they are separate business entities not only in the period preceding the award of work, but also during the course of its performance⁴⁸. Increasingly local authorities and their DSOs deal with each other as if they are separate business entities. It would therefore appear that the transactions resulting from the operation of the CCT legislation fall within the parameters discussed by Donaldson J and can thus be characterised as being potentially contractual.

As a matter of domestic law it would thus appear that transactions between councils and their in-house service providers are of a contractual nature. Therefore the public procurement directives, in principle, are capable of being applied, and the substance of the CCT legislation must be evaluated against the provisions of the relevant directives.

Having established that as a matter of principle CCT legislation falls within the scope of the EC public procurement directives, it now remains to examine the extent to which the subject matter of the UK's CCT legislation and the directives coincide.

THE ACTIVITIES SUBJECT TO CCT LEGISLATION AND THE SERVICES DIRECTIVE.

The activities of local government regulated by the Local Government Acts 1988 and 1992 fall into two broad categories; the provision of essentially manual (or "blue collar") services, and the

⁴⁶ Local Government Planning and Land Act 1980 SS 10-16, Local Government Act 1988 SS9, 10

⁴⁷ See on this point Walsh and Davis, op. cit., Ch 8, particularly 8.13-21

⁴⁸ See, for example, Walsh and Davis, Ch 10, on the operation of contract default systems, where only limited evidence was found of authorities treating external contractors and DLOs differently

provision of professional, technical and administrative (or "white collar") services. It is worth noting that the statutes in question, and the relevant delegated legislation, do not merely attempt to define the description of the activity subject to competition, but also set out to define the circumstances in which competition is not required, which is primarily achieved by the prescription of *de minimis* limits. It now remains to compare the scope of the domestic regime with its European counterpart.

Competitive tendering of blue collar services

Definition

The Local Government Act 1988, which extended CCT to cover local authority services, initially subjected seven "defined activities" to competition; refuse collection, cleaning of buildings, other cleaning, schools and welfare catering, other catering, ground maintenance, and vehicle maintenance⁴⁹. However, this list was not intended to be exclusive, as S2(3) grants the power to the Secretary of State to make an order adding a new defined activity to those listed in S2(2). Such an order may only be made by statutory instrument, the draft of which must be adopted by each House of Parliament⁵⁰, and may make such supplementary, incidental, consequential or transitional provisions as appear necessary to the Secretary of State⁵¹, including provisions amending or adapting any provision of the 1988 Act for the purposes inter alios of defining the activity added to S2(2)⁵². Moreover, prior to such an order being made the Secretary of State must consult "such representatives of local government as appear to him to be appropriate"⁵³. To date (1st June 1995) this power has been used to add the management of sports and leisure

⁴⁹ See S2(2)(a)-(g)

⁵⁰ S 15(1)

⁵¹ S15(7)

⁵² S15(8)

⁵³ S2(4). Given the wording of this provision, consultation must conform to the parameters set by *R v Sec. of State for the Health ex. p. U.S. Tobacco International* [1992] 1 All ER 212, *Agricultural Training Board v Aylesbury Mushrooms Ltd* [1972] 1 All ER 280, *R v Sec. of State for Social Services ex. p. Association of Metropolitan Authorities* [1986] 1 All ER 164

facilities⁵⁴, and supervision of parking, vehicle management and security work⁵⁵. It is also worthy of some note that, while the S2 provides a mechanism for adding services to the list of defined activities, and while a variety of exemptions may be granted regarding those services⁵⁶, no mechanism is provided for the removal of a service from the list of defined activities contained in S2(2).

While the activities which are subject to the requirements of Part I of the 1988 Act are enumerated in S2(2), the content of each defined activity is set out in Schedule 1. Many of the defined activities are, to a great extent, self-explanatory, and, as they have been extensively discussed elsewhere⁵⁷, they require only brief examination here. Refuse collection is defined as being, essentially, the collection of household and commercial waste, but not sewage⁵⁸. While building cleaning includes window cleaning (both inside and out) and the cleaning of the interior of buildings, the cleaning of the exterior of a building or of dwellings, certain "residential establishments" or of police establishments, is excluded⁵⁹. Other cleaning includes, most significantly, street cleaning, emptying of litter bins, the removal of litter (except derelict vehicles, scrap metal and "derelict vessels"), emptying of gullies and cleaning of street signs⁶⁰. Schools and welfare catering is, in essence, the preparation and provision of meals and sustenance in schools (except those special or residential schools which prepare meals on the premises), residential homes and day care centres (except those where meals are prepared on the premises), and meals on wheels services⁶¹. Given the range of institutions excluded from its ambit, "other catering" is, in essence, the provision of meals and

⁵⁴ See the Local Government Act 1988 (Competition in Sports and Leisure Facilities) Order 1989 S.I. no. 2488, inserting S2(2)(ee) and Schedule 1 paragraph 8 into the 1988 Act

⁵⁵ Local Government Act 1988 (Competition) (Defined Activities) Order 1994 S.I. 2884 inserting, respectively S2(2)(ff), (gg) and (j), and Schedule 1 paragraphs 6A, 7A and 10

⁵⁶ See below for a discussion of these exemptions

⁵⁷ See e.g. Cirrel and Bennett, CCT: Law and Practice 7.1-36

⁵⁸ Schedule 1 paragraph 1

⁵⁹ Schedule 1 paragraph 2

⁶⁰ Schedule 1, paragraph 3

⁶¹ Schedule 1, paragraph 4.

sustenance in canteens⁶². The most significant activities which constitute ground maintenance are: cutting and tending grass ; planting and tending trees, hedges, plants, shrubs and flowers (but excluding landscaping); and weed control⁶³. Repair and maintenance of vehicles is fairly self-explanatory⁶⁴, although it is significant that repair of accident damage⁶⁵, and the repair and maintenance of police vehicles are exempted⁶⁶

The management of sports and leisure facilities, the first activity to be added to the list of defined activities after the 1988 Act was passed, covers facilities which provide a wide range of sporting and recreational activities, from the obvious such as swimming pools, gymnasia, pitches provided for team games, golf courses, and bowling greens, to the less obvious such as "centres for flying, ballooning, or parachuting"⁶⁷. Facilities are exempted, however, if they are part of an educational establishment, or where educational institutions have had exclusive use of the facility for at least 600 hours in the previous financial year⁶⁸. The functions which fall within this defined activity are also extensive, and include arranging for instruction in, or supervision of, a sport or physical recreational activities, taking bookings, collecting fees, and arranging security, catering, cleaning and maintenance. The other blue collar activities which have been added since 1989 are slightly more straightforward. Supervision of parking basically covers the giving or fixing of parking tickets, fixing and removing wheel clamps, and the removal detention, and release of vehicles⁶⁹. Security work is defined as being the operating of patrols, or entrance checkpoints, on any premises occupied by a defined authority, although libraries, museums, art galleries, police and residential establishments, and dwellings are excluded from the list

⁶² Schedule 1, paragraph 5

⁶³ Paragraph 6

⁶⁴ Paragraph 7(1)

⁶⁵ Paragraph 7(2)

⁶⁶ Paragraph 7(3)

⁶⁶ Paragraph 8(1)

⁶⁸ See Schedule 1, paragraph 8(3), (5)

⁶⁹ Paragraph 6A

of premises⁷⁰. Finally, vehicle management consists of arranging for there to be sufficient motor vehicles to meet an authority's needs, that the vehicle fleet is cleaned, fuelled, repaired and maintained, and ensuring that those vehicles and their drivers are properly licensed, registered and insured, and that the vehicles meet statutory safety requirements⁷¹.

There are several other provisions of the 1988 Act which are of some interest. Firstly, where work falls within more than one defined activity, S2(5) declares that "it shall be treated as falling only within such one of them as the authority carrying out the work decide". Secondly, S2(7) provides that, if in the opinion of a authority, work which does not fall within a defined activity cannot be carried out efficiently separately from a defined activity, the authority may decide to treat that work as if it falls within a particular defined activity. Both of these provisions give considerable discretion to an authority when packaging its work in preparation for a tendering exercise⁷².

Exemptions

The 1988 Act provides that certain work will fall outside the scope of the competitive tendering regime which it establishes. Thus, as one might expect, an exception is made regarding work intended to alleviate, avert or eradicate the effects or potential effects of a disaster⁷³. Work falling within a defined activity which forms only an incidental part of an employee's functions⁷⁴ is also exempted from the Act's provisions. In addition, S2(9) provides that:

"The Secretary of State may provide by order that any activity specified in the order, if carried out by a defined authority or authorities so specified, shall not be treated as a defined activity so long as conditions so specified are fulfilled"

⁷⁰ Paragraph 10

⁷¹ Paragraph 7A

⁷² For a discussion of their importance, see Ch 4 on anti-competitive practices

⁷³ S2(8), cf. Reg. 9(1)(a) of the Local Government (Direct Labour Organisations) (Competition) Regulations 1989 S.I. 1588

⁷⁴ S2(6). The effect of this provision is to place essentially janitorial services outside the scope of the Act

Such an order may only be made by statutory instrument, and, unlike orders adding new defined activities, is subject to annulment procedure⁷⁵. Such orders "may make different provision for different cases or descriptions of case (whether for different areas, different defined authorities or kind of authority, different defined activities, or otherwise)"⁷⁶. An order issued under the provisions of S2(9) and S15(5) is thus potentially of some importance as it may result in some variation of the scheme of the Act in relation to a particular activity, defined authority or location⁷⁷. The provisions of S2(9) and S15(5) are of particular importance, however, because they provide the authority with a wider range of exemptions intended to permeate the scheme of competition established by the Act. The most significant pieces of delegated legislation which have been issued under these provisions are the Local Government Act 1988 (Defined Activities) Orders⁷⁸. The exemptions orders specify three situations in which work ostensibly falling within a defined activity shall be treated as being outwith the scope of a defined activity. First, if work falling within a defined activity is carried out by an employee who is required as a condition of his employment to live in particular accommodation for the better performance of his duties, that work will fall outwith the scope of the defined activity⁷⁹. However, for this exemption to apply, the work falling within any given defined activity must form only part of the employee's duties. Secondly, the repair and maintenance of a fire service vehicle is exempted from the definition of repair and maintenance of vehicles⁸⁰. Thirdly, work shall not be treated as falling within a defined activity if it is carried out pursuant to an agreement made under certain statutory provisions⁸¹, and the Secretary of State has agreed to pay the whole or part of its cost.

⁷⁵ S15(2)

⁷⁶ S15(5)

⁷⁷ See e.g. Local Government Act 1988 (Defined Activities) (Exemption) (Greater Manchester Fire and Civil Defence Authority) Order 1993, 1993 S.I. no. 365, regarding other catering

⁷⁸ England; 1988 S.I. 1372, Scotland; 1988 S.I. 1415

⁷⁹ See 1988 S.I. 1372, reg. 4

⁸⁰ Ibid. reg. 5

⁸¹ E.g. the Employment and Training Act 1973

Also to be considered are the exemptions temporarily arising out of reorganisation. In England the majority of blue-collar services are subject to a moratorium on complying with the 1988 Act's provisions for eighteen months after reorganisation if the work is to be completed in less than a year, or has an annual value of less than £200,000, or where the date for receiving replies to an invitation to tender falls on or before the date on which an order effecting reorganisation comes into force⁸², although those unaffected by reorganisation must comply with the Act's provisions by 1 April 1996. In relation to parking supervision, vehicle management and security work, however, there is simply a moratorium of eighteen months dating from the day on which reorganisation comes into force⁸³. In Scotland and Wales it has been indicated that CCT moratoria will apply on similar conditions after reorganisation ⁸⁴

Thresholds

The real significance of the Exemptions Orders, however, lies in the fact that they have been the principal means by which the financial thresholds for CCT of local authority services are set. Basically, the orders set the threshold for the defined activities contained in S2(2)⁸⁵. The wording of the Regulations is significant, Regulation 3(1) stating that:

"None of the activities mentioned in S2(2) of the Act shall be treated as a defined activity so long as the condition mentioned in paragraph (2) is fulfilled"

Given that the wording encompasses all of the defined activities included in S2(2), any activities added to the list contained therein will automatically be subjected to the same exemptions, unless, as is open to the Secretary of State, he uses the discretion given to him by S2(9) and S15(5) to set a different threshold for an individual activity, although, at present, all blue collar activities are subject

⁸² Local Government Changes for England (Direct Labour and Service Organisations) Regulations 1994 S.I. 3167 Ergs 12, 14

⁸³ Local Government Act 1988 (Defined Activities) (Competition) (Supervision of Parking, Management of Vehicles, and Security Work) (England) Regulations 1994 S.I. 3165

⁸⁴ See Local Government (Exemption From Competition) (Scotland) Order 1995 S.I. 678; also Local Government (Wales) Act 1994 S52

⁸⁵ See e.g. 1988 S.I. 1372

to the same threshold⁸⁶. At present, however, Regulation 3(2) specifies that:

"...the amount estimated by the authority as the gross cost of carrying out the activity in question through their direct labour organisation or a similar organisation in the immediately preceding financial year does not exceed £100,000"

The calculation of the figure of £100,000 shall include the portion of the authority's administrative costs as are attributable to the carrying out of the function⁸⁷, but shall exclude the cost of functional work⁸⁸, and the cost of the work covered by the other exemptions established by the Exemption Orders, and discussed above. However, perhaps the most significant point to note about the threshold set by for competition under the 1988 Act is that it is set with regard to the value of work carried out in the "immediately preceding financial year", not, as with work under the 1980 Act, the estimated cost of the work to be performed.

Interaction with Directive 92/50

The question which must be posed, however, is: to what extent do the blue-collar services subjected to competition by the 1988 Act coincide with the services falling within the scope of Directive 92/50 relating to the co-ordination of procedures for the award of public service contracts?

Directive 92/50, lists the services to which it applies in Annex 1A and Annex 1B. The division of the lists results in the services listed in Annex 1A being, essentially, subject to all of the directive's requirements regarding tendering procedures, while those listed in Annex 1B need only at present comply with the directive's requirements regarding common technical specifications and the publication of award notices. The reason for this distinction between services is set out in the preamble:

⁸⁶ The Secretary of State has, however, used his powers to set different thresholds for white-collar activities: see below

⁸⁷ Ibid. reg. 3(3)(a)

⁸⁸ Ibid. reg. 3(3)(b)

"...the full application of the Directive must be limited ,for a transitional period, to contracts for services where its provisions will enable the full potential for increased cross-frontier trade to be realised; whereas contracts for other services need to be monitored for a certain period before a decision is taken on full application of this Directive..."

The Directive's limitation of its full application to those services which are most likely to be the subject of trans-community competition must, however, be reviewed at the latest three years after the date by which Member States should have implemented the Directive (i.e. by 1st July 1996) At present, however, it is only necessary to identify that common ground exists between the services subject to the 1988 Act and Directive 92/50.

Taking each defined activity listed in the 1988 Act in turn it would appear that there is a considerable identity of subject matter between the 1988 Act and the Directive. Refuse collection would appear to fall within the scope of category 16 of Annex 1A, "[s]ewage and refuse disposal services; sanitation and other services". It is probable that the constituent elements of "other cleaning" (street cleaning, for example, can be characterised as a sanitation, or a "similar" service) also fall within category 16. Cleaning of buildings will fall within the scope of category 14 of Annex 1A, "[b]uilding cleaning and property management services". Catering for the purposes of catering and welfare, and other catering, on the other hand, are both Annex 1B services, falling within category 17, "[h]otel and restaurant services". Ground maintenance is perhaps the most difficult to categorise, as it is tempting to place it within category 12, as "urban planning and landscape services", although it is perhaps more likely to fall within the categories of "nature and landscape protection services"⁸⁹ or "other environmental protection services not elsewhere covered"⁹⁰ contained in category 14: irrespective of which it is, in principle, an Annex 1A service. Repair and maintenance of vehicles, however, would appear to fall squarely within category 1. The management of sport and leisure services apparently presents a problem: if one

⁸⁹ CPC no.9406

⁹⁰ CPC no 9409

examines the definition of management of sports and leisure activities contained in Schedule 1 of the 1988 Act, it is apparent that the management of such facilities may encompass arranging the performance of activities such as catering, which is an Annex 1B service, and cleaning, which is an Annex 1A service. However, one must bear in mind that paragraph 8(4) of Schedule 1 states that "without prejudice to the term, 'managing' includes arranging" for the provision of a number of services ancillary to the running of the facility in question. It must be remembered that what is subject to competitive tendering is the right to manage a sports or leisure facility, not the right to provide catering or cleaning on such premises. Consequently, as it is in essence the right to manage the facility which is being competed for, this is an Annex 1B service, falling within category 26, recreational, cultural and sporting services.

Of the three most recently added blue-collar services, vehicle management may either fall within group 20, or group 27, as "administrative transport and communication related services"⁹¹ as it represents "other supporting services for road transport"⁹²; in either case it would appear to be an annex 1B service. Security services clearly fall within category 23 of Annex 1B. Supervision of parking is more difficult to categorise exactly: does it fall within category 20, supporting and auxiliary transport services, which includes "parking services"⁹³, or category 27, other services, both of which are Annex 1B services?

It is convenient to note at this stage the peculiarities of the categorisation of the services covered by the Directive 92/50. Each category is based on the United Nations Common Product Classification (CPC) and has a CPC number, with the exception of category 27, "other services", an Annex 1B category which presumably exists to catch those tendering exercises which do not fall within the subject matter of any other category. As the preamble to the directive relates, it is likely that the CPC

⁹¹ CPC no 7449

⁹² CPC no. 91134

⁹³ CPC no 7443

classification will be replaced in the future by Community nomenclature. However, at present, the CPC classification of each service category does result in an extensive range of activities being regulated by the directive's provisions: each series of CPC numbers includes, as one commentator points out⁹⁴, a 'not elsewhere covered' classification, which effectively makes the categorisation of services a generic, not a specific, exercise.

The final issue regarding the interaction of the directive and the 1988 Act relates to the financial thresholds. Article 7(1) states that:

"This Directive shall apply to public service contracts, the estimated value of which, net of VAT, is not less than ECU 200,000."

The sum of 200,000 ECU "shall include the estimated total remuneration of the service provider"⁹⁵, and the valuation method must not be adopted with a view to avoiding the Directive's application: likewise, a contract may not be split up in order to avoid the Directive's application⁹⁶. The provisions regarding valuation of contracts are fairly complex⁹⁷: the circumstances in which contracts must be aggregated for the purposes of calculating whether the 200,000 ECU limit will be surpassed, and in which a limited amount of work can be discounted for the purpose of such calculations are closely defined by provisions which mirror those contained in the Works Directive (93/37)⁹⁸. The basis for calculating the estimated value of contracts which do not specify a total price is set out in Article 7(5), which states that when a fixed term contract is of less than 48 months in duration, the total contract value for its duration must be taken. Where, however, the contract is of indeterminate duration, or for a term of more than 48

⁹⁴ See Trepte, *Public Procurement in the EC*, p105

⁹⁵ Article 7(2)

⁹⁶ Article 7(3)

⁹⁷ See Article 7 generally. For an explanation of the provisions see Brown, *Getting to Grips with Aggregation under the E.C. Public Procurement Rules*, [1993] 2 P.P.L.R. 69, especially pp 75-6.

⁹⁸ See Article 7(4)

months, one must multiply the monthly instalment by 48 in calculating the estimated contract value.

There are two things which one must note about the interaction of the financial thresholds contained in the 1988 Act and Directive 92/50. The first is that the pecuniary levels are different. The threshold set for competition in the 1988 Act's defined activities is £100,000, while the Directive sets a limit of 200,000 ECU (approximately £150,000). Secondly, matters are apparently complicated by the fact that the threshold for 1988 Act work is set on the basis of the gross cost of performing an activity in the immediately preceding financial year, while the threshold for application of the Directive's provisions is calculated on the estimated value of the contract to be awarded. The domestic legislation thus looks backward in time, while the Directive looks forward. Does this create grave difficulties for the interaction of the two regimes?

While the two regimes may have a different temporal focus on this matter, at a practical level, there should be few, if any, real difficulties. It should be noted that the Services Directive does not compel competitive tendering, but instead sets objective standards for the award of contracts relating to a range of services as long as they exceed a prescribed value. The tendering exercise in question will either be voluntary, or compelled, as is the case here, by a member state's domestic legislation. In view of the fact that it is the value of the contract over its duration which is of importance, the UK regulations specifying the minimum and maximum duration of contracts resulting from the operation of the 1988 Act's operation are of considerable relevance⁹⁹. The regulations set the minimum duration of most contracts at 4 years, the most significant exception being refuse collection, contracts for which must be of a minimum of 5 years in duration. If one relates the duration of contracts for these services to the financial threshold of 200,000

⁹⁹ See e.g. the Local Government Act 1988 (Defined Activities) (Specified Periods) (England) Regulations 1988, 1988 S.I. 1373. The equivalent Scottish provisions are contained in 1988 S.I. 1414. See also the Local Government Act 1988 (Defined Activities) (Competition) (Supervision of Parking, Management of Vehicles and Security Work) (England) Regulations 1994 S.I. 3165

ECU contained in the Directive, then, to avoid the application of the directive's provisions, the annual value of the work in question would have to be less than 50,000 ECU (about £38,000) for most services, or 40,000 ECU (about £30,000) for refuse collection. Moreover, one must remember that while the directive does not compel tendering, the regime established by the 1988 Act does if the gross value of performing the activity in the previous year exceeded £100,000. Even if we allow for the financial savings of CCT, which are presently calculated to average 6.5%¹⁰⁰, a local authority which barely exceeds the threshold of £100,000 for 1988 Act work would still, as a result of the Regulations specifying the permitted duration of contracts, be letting a services contract with a total value of over £350,000: far in excess of the figure of 200,000 ECU required to ensure the Directive's application. An examination of the practical import of both regimes therefore illustrates that in spite of different threshold limits and a different temporal focus, where work is subjected to competition by the 1988 Act, it will inevitably fall within the scope of Dir. 92/50.

Competitive tendering for white-collar services

Definitions

The final set of services subjected to CCT are those of an administrative, professional or technical nature. Two statutes are of relevance to the consideration of these services: the Local Government Act 1988 and the Local Government Act 1992.

The starting point for any examination of the statutory framework regarding the application of CCT to white collar services should be S8 of the Local Government Act 1992, which was ostensibly enacted for the purposes of regulating competition for administrative, technical and professional services. The provisions of S8 are inextricably linked to those of the 1988 Act, S8(2), for example, declares that:

"This section applies to work which-

¹⁰⁰ See Walsh and Davis, *Competition and Service: The Impact of the Local Government Act 1988*, at 13.5

- (a) by virtue of an order under S2(3) of the 1988 Act, falls within a defined activity for the purposes of Part I of that Act; and
- (b) consists in, or involves, the provision of professional advice or of other professional services or the application of any financial or technical expertise"

It is significant that S8(2) provides that white collar services must be defined activities for the purposes of the 1988 Act before S8 of the 1992 Act can be used to shape the tendering regime for each particular service: this is indeed necessary due to the skeletal form of the 1992 Act, which, for example, has no equivalent of the provisions contained in S13 and S14 of the 1988 Act which, among other things, enable the Secretary of State to investigate allegations of deficiencies in the tendering process and to take action against errant local authorities.

Several of the other provisions of S8 bear some similarity to those contained in the 1988 Act: orders under this section must be made by statutory instrument approved by resolution of each House¹⁰¹, can only be made following consultation with the appropriate representatives of local government¹⁰², may make such incidental, consequential, transitional or supplementary provision as the Secretary of State "thinks necessary or expedient", and may make "different provision for different cases, including different provision for different localities and for different authorities"¹⁰³. While S8 may initially have been intended specifically to address the complexities of extending CCT to administrative, technical and professional services, the fact is that this section has not yet been brought into force. In view of that fact it is necessary to give some brief consideration to the provisions of the 1988 Act which may be used to extend CCT to white collar services.

To an extent, it is necessary to discuss the provisions of S2 of the 1988 Act once more irrespective of whether S8 of the 1992 Act is brought into force or not: if S8 is brought into force, it requires that a service must also be a defined activity for the purposes of the

¹⁰¹ S8(4)

¹⁰² S8(3)

¹⁰³ S8(5)

1988 Act, but if it is not in force, the only means of subjecting a service to CCT would be to include it in the list of defined activities and thus bring it within the scope of the 1988 Act's regime. However, at present, due to the absence of any order bringing S8 into force, we must concentrate on the latter scenario. Basically, if the Secretary of State relies solely on the provisions of the 1988 Act to extend CCT to white collar services, the procedure which he must follow is identical to that for bringing a blue-collar service within the 1988 Act's provisions: the Secretary of State would have to consult such representatives of local government as he thinks appropriate¹⁰⁴ before obtaining the assent of each House of Parliament to an order which adds a new defined activity to the list contained in S2(2)¹⁰⁵. Thus the procedure for extending CCT to white collar services is essentially the same whether or not S8 of the 1992 Act is brought into force. What, however, of the content of the regulations issued in such circumstances?

If the Secretary of State were limited to using the 1988 Act in extending the range of defined activities, he is empowered by S15(7) to make such supplementary, incidental, consequential or transitional provisions as he considers appropriate¹⁰⁶, and may include in any order issued under S2(3) provision for amending or adapting the Act for the purposes of defining the scope of the defined activity¹⁰⁷. In addition the Secretary of State may provide by order that an activity carried out by an authority or authorities specified therein shall not be treated as a defined activity unless certain conditions are fulfilled: such orders may make provision for different areas, defined authorities or kinds of defined authorities, or different defined activities¹⁰⁸. The legislative framework is thus capable of providing the authority for regulations which could tailor the scope, exemptions and financial threshold of each white collar service which is added to the list of defined activities contained in S2(2). When one also bears in mind that the various powers given to the Secretary of State by sections 6,7,8 and 15(6) of the 1988

¹⁰⁴ S2(4)

¹⁰⁵ SS 2(3) and 15(1)

¹⁰⁶ Compare this to S8(5)(a) of the 1992 Act

¹⁰⁷ S15(8)(a)

¹⁰⁸ S2(9) and S15(5), c.f. s8(5)(b) of the Local Government Act 1992

Act¹⁰⁹ would enable him to issue competition regulations for each defined activity (irrespective of whether it is a blue or a white collar activity) one must question the necessity for enacting S8 of the 1992 Act: if brought into force it would achieve nothing which could not be accomplished under the 1988 Act. Even the only provision apparently unique to the 1992 Act, the "double envelope" procedure intended to ensure that tenders meet a qualitative threshold¹¹⁰ could be achieved by delegated legislation issued under the 1988 Act¹¹¹.

At present three white-collar services have been added to the list of defined activities set out in S2 of the 1988 Act: housing management¹¹², legal services¹¹³, and construction and property related services¹¹⁴. The definition of housing management is a wide ranging one, which encompasses a wide variety of housing functions, such as applications for tenancies, rent collection, arranging for repairs to housing stock, operating security systems, and taking steps to remove unlawful occupants¹¹⁵.

The definition of legal services is a particularly complex one, which takes a different approach to defining the scope of the defined activity. First, legal services are defined in relation to whom legal advice will be given: namely a defined authority, its members, committees, sub-committees, any group which reports to an authority, and any officer or department of an authority¹¹⁶, as well as advice to any other person in relation to a defined authority's discharge of its functions¹¹⁷. Secondly, the range of other legal work

¹⁰⁹ These provisions, which relate to the tendering process will be discussed in the next chapter

¹¹⁰ S8(1) of the 1992 Act

¹¹¹ See SS7(4), 8(2)(b) and 15(6), discussed *infra* Ch2

¹¹² S2(2)(h) and Schedule 1 paragraph 9, inserted by the Local Government Act 1988 (Competition) (Defined Activities) (Housing Management) Order 1994 S.I. 1671

¹¹³ S2(2)(j) and Schedule 1 paragraph 11, inserted by the Local Government Act 1988 (Competition) (Defined Activities) Order 1994 S.I. 2884

¹¹⁴ S2(2)(k) and Schedule 1 paragraph 12, inserted by the Local Government Act 1988 (Competition) (Defined Activities) (Construction and Property Services Order 1994 S.I. 2888

¹¹⁵ Schedule 1, paragraph 9

¹¹⁶ Schedule 1, paragraph 11(2)(a)

¹¹⁷ Paragraph 11(2)(b)

which fulfils the definition is set out. This is extensive, and, as one might expect, includes matters such as civil and criminal litigation, conveyancing, contracts and insurance-related work, as well as work in relation to bylaws and private and local legislation¹¹⁸. Finally, the staff whose work falls within the defined activity are set out: solicitors, barristers, advocates, legal executives and licensed conveyancers, as well as "any person under their management or control"¹¹⁹, a classification which brings the work of general clerical staff within the ambit of the defined activity.

Some parallels can be drawn between the definition of legal services and the definition of construction and property services. As with legal services, an important part of the definition of construction and property services relates to the giving of advice to certain persons and bodies¹²⁰. Many of the other functions falling within the definition of construction and property services are fairly obvious: architecture, engineering, valuation, property management and surveying¹²¹, although, perhaps less obviously, various elements of the development and maintenance¹²² of roads and land which the authority is responsible for, occupies, or wishes to acquire an interest in¹²³, are included.

Exemptions

As with other 1988 Act services, work will not be treated as falling within a defined activity if it forms only part of the duties of an employee of a defined authority. However, whereas S2(6) of the 1988 Act provides that in relation to blue-collar activities work will be treated as exempt if it is "incidental" to an employee's duties, the Secretary of State has used his powers to specify the proportion of an employee's work which may be treated as exempt for the purposes of S2(6). For housing management, work will be exempted if it takes up less than 25 per. cent. of the working time of an employee who normally works more than thirty hours a week, or

¹¹⁸ Paragraph 11(2)(c)-(f)

¹¹⁹ Paragraph 11(3)

¹²⁰ Schedule 1, paragraph 12(3)(a), (b)

¹²¹ Paragraph 12(2)

¹²² Paragraph 12(3)(c)-(f)

¹²³ Paragraph 12(5)

50 per. cent. of any other employee's time¹²⁴. In relation to both legal services¹²⁵ and construction and property related services¹²⁶, work will be deemed to be exempt if it takes up less than 50 per. cent. of an employee's time.

The other important category of exemptions are those arising from the various moratoria arising from local government reorganisation. The effect of local government reorganisation upon the competition process is in some respects most profound in England, due to the staggered implementation of reorganisation. This is most obvious in relation to legal services¹²⁷ and construction and property services¹²⁸, which provide that authorities subject to structural change effective from 1 April 1995 need not comply with the 1988 Act's provisions for two years following the date on which reorganisation becomes effective, although those local authorities not subject to reorganisation must comply with the legislation by 1 April 1996. In Scotland and Wales the requirements of the 1988 Act regarding white-collar services must be complied with between 1 April 1998 and 1 April 1999¹²⁹. As regards housing management, the effect of reorganisation is almost identical, although the relevant regulations are couched in slightly different terms. In England there is a moratorium of two years provided certain requirements are met as to the value of the work or the size of an authority's housing stock¹³⁰. In Scotland the 1988 Act's requirements must be complied with regarding 30 per. cent. of the contract value by 1 April 1998, and the remaining 70 per. cent. by 1 April 1999.

¹²⁴ Local Government Act 1988 (Competition) (Defined Activities) (Housing Management) Order 1994 S.I. 1671, Reg. 3

¹²⁵ Local Government Act 1988 (Competition) (Defined Activities) Order 1994 S.I. 2884, Reg. 3

¹²⁶ Local Government Act 1988 (Competition) (Defined Activities) (Construction and Property Services) Order 1994 S.I. 2888, Reg. 3

¹²⁷ Local Government Act 1988 (Competition) (Legal Services) (England Regulations) 1994 S.I. 3164, Reg. 3

¹²⁸ Local Government 1988 (Competition) (Construction and Property Services) (England) Regulations 1994 S.I. 3166, Regulation 3

¹²⁹ See e.g. letter from Scottish Office Environment Department to local authority chief executives, 27th January 1995. Cf. Local Government (Exemption from Competition) (Scotland) Order 1995 S.I. 678; also Local Government (Wales) Act 1994 S52

¹³⁰ See the Local Government Changes for England (Direct Labour and Service Organisations) Regulations 1994 S.I. 3167, Reg. 12

Thresholds

The Secretary of State has also used his powers to tailor the competition thresholds for white collar services. Due to the vagaries of local government reorganisation, thresholds have, as yet, only been set for local authorities in England, although there is no reason to suppose that either the thresholds, or the scheme of the necessary subordinate legislation will be different in Scotland or Wales.

The *de minimis* threshold for housing management CCT in England and Wales has been set at £500,000 by virtue of an amendment to the existing exemptions regulations regulating blue-collar work¹³¹. The extent to which legal, construction and property services are subject to CCT is calculated by reference to complex formulae contained in the relevant competition regulations. However, at the risk of over-simplifying the matter, the regulations essentially provide that the *de minimis* threshold for CCT for legal services will be either 55 per. cent. of the total value of the legal work performed, or £300,000, whichever is the greater¹³². For construction and property services it will be 35 per. cent. of the total value of the work performed, or £450,000, if that is a greater figure¹³³. As usual these figures are calculated on the basis of work performed in the previous year.

Interaction with the Directive 92/50

There are few problems in relating the subject matter of the white-collar services to Directive 92/50. Legal services falls squarely within category 21 in Annex 1B. Housing management falls within category 14 of Annex 1A, building cleaning and property management services, while construction and property services, when examined, straddles category 14, and category 12, which relates to

¹³¹ See e.g. Local Government Act 1988 (Defined Activities)(Exemptions) (England) Order 1988 S.I. 1372, Regulations 3(1A) and 3(2A), as inserted by the Local Government Act 1988 (Defined Activities) (Exemptions) (England and Wales) (Amendment) Order 1994 S.I. 2296

¹³² Local Government Act 1988 (Competition) (Legal Services) (England) Regulations 1994 S.I. 3164

¹³³ Local Government Act 1988 (Competition) (Construction and Property Services) (England) Regulations 1994 S.I. 3166

architectural, engineering and related services, both of which are contained in Annex 1A.

Given that the *de minimis* limits for white-collar services are considerably higher than those set for blue-collar activities it is almost inconceivable that a contract for white collar services resulting from a tendering exercise will not exceed Directive 92/50's 200,000 ECU *de minimis* limit.

Conclusions

The range of activities subject to CCT by virtue of Part I of the Local Government Act 1988 is particularly extensive. Moreover, the 1988 Act endows the Secretary of State with a variety of powers to facilitate the expansion of the range of activities subject to CCT. In the past year in particular those powers have been used to bring a number of services within the list of defined activities contained in the 1988 Act. Significantly, the recently added defined activities have extended the activities subject to CCT beyond blue-collar services and into professional services for the first time. This illustrates both the potential for expanding CCT, and the flexibility of the regime established by the 1988 Act: it has proved capable of achieving all of the tasks for which S8 of the Local Government Act 1992 was enacted, thus showing how unnecessary that provision was.

It is notable that those matters which are exempted from the operation of CCT are, in general, of a fairly insignificant nature. However, while the regimes established by the 1988 Act have sought to embrace as many of the activities of local government as possible, local government reorganisation has proved to be a very disruptive influence. The moratoria on the application of CCT during reorganisation has far reaching effects: in particular the staggered process of reorganisation in England, and the basis on which work is exempted from the application of the legislation will almost certainly ensure that no two local authorities are affected in exactly the same way. While the moratoria in Scotland and Wales may only result in a temporary, easily ascertained, suspension of the

1988 Act's provisions, and a delay in the implementation of CCT for the most recently added services, in England its effects will linger long after the process of review and reorganisation has been completed.

Finally, it must be realised that the domestic legislation can no longer be viewed in isolation: one must always have regard to potentially relevant European legislation. In evaluating the tendering regimes established by the 1988 Act, it is necessary to evaluate their legal propriety against the standards set by the Services Directive. But does the Directive apply? It would appear that there is no difficulty in showing that the arrangements resulting from the operation of the 1988 Act falls within the scope of the Directive. However, there is one significant factor which appears to limit the utility of the Services Directive in evaluating national tendering regime: the fact that the Services Directive does not apply in full to all services, although the application of the Directive in full will be reviewed in due course

CHAPTER 2:

THE TENDERING PROCEDURES

As was illustrated in chapter 1 the activities of local authorities subject to compulsory competitive tendering can be divided into two categories; blue-collar services, and white-collar services. Tendering for white-collar services, in the absence of the provisions of S8 of the 1992 Act being brought into force, is conducted in accordance with the 1988 Act's provisions, with some amendments. It is thus possible to use the provisions of the 1988 Act as the basis for consideration of the framework of the tendering regime.

However, the 1988 Act does not establish one simple tendering regime, but, ostensibly establishes two: one for "works contracts", the other for "functional work". It is necessary to consider this distinction, and the impact of recent legislative developments upon this distinction, briefly.

The works contract/functional work distinction

The distinction between works contracts and functional work originated in the Local Government, Planning and Land Act 1980¹, and was retained by the Local Government Act 1988, S3 of which provides:

"(2) 'Works contract' means a contract constituting or including an agreement which provides for the carrying out of work by a defined authority.

(3) But a contract is not a works contract if it constitutes or includes an agreement providing for a defined authority to discharge the functions of a Minister of the Crown, another defined authority....

(4) 'Functional work' means-

(a) work carried out by a defined authority, other than work carried out under a works contract...."

¹ See Ss 5, 8

The statute essentially provides that a works contract is an agreement for one authority to perform work for another authority, while functional work is that carried out by a local authority in pursuance of its own, or another authority's functions, or those of a Minister of the Crown.

Soon after the 1988 Act came into operation, however, problems arose regarding the ability of local authorities to perform work for each other. While the tendering procedures established by the 1988 Act, and its precursor, the 1980 Act, made provision for authorities to bid for each others' work, in the opinion of the Audit Commission this did not endow councils with the right to perform work for each other. Indeed, an authority which did perform work for another authority would be acting in breach of the prohibition on local authority trading² unless it could show that it was utilising surplus capacity in the activity in question³. The Audit Commission's advice stimulated some debate on the validity of cross-boundary contracts⁴ and criticism of the Commission's practices in issuing legal advice⁵. It would appear, however, that inter-authority contracts are not particularly common, the service most often the subject of a works contract being ground maintenance⁶.

The controversy surrounding works contracts may, however, soon be of only historic interest: recent legislation renders works contracts, and the works contract/functional work distinction obsolete in Scotland and Wales, while Government Ministers have indicated that they would be willing to allow English local authorities to contract with each other after reorganisation⁷.

² See Local Government Act 1972, S152; Local Government (Scotland) Act 1947, S195(a)

³ Audit Commission Technical Release 23/90- Cross Boundary Tendering: Local Authorities Doing Work for One Another

⁴ See e.g. Fraser, Power to Work for Each Other, 10/8/90 LGC 20; Morris, New Laws Upset Calm in Cross-Border Contract Situation, 1/6/90 LGC 19

⁵ See Taylor, Commission's Advice Should Stick to Legal Specifics, 23/3/90 LGC 21; Cirell/Bennet, Overstepping the Mark, 30/3/90 LGC 20. The issue of the Audit Commission's legal advice is also discussed in Radford, Auditing for Change: Local Government and the Audit Commission [1991] 54 MLR 912

⁶ See Walsh and Davis, Competition and Service: *The Impact of the Local Government Act 1988*, paragraph 8.2 and table 8.2

⁷ See Public work totalling £1.1 bn put out to tender 8/2/94 FT 10 for comments made by Tony Baldry

The status of inter-authority contracts in Scotland and Wales has thus been radically affected by S58 of the Local Government etc. (Scotland) Act 1994, and S25 of the Local Government (Wales) Act 1994. Both are couched in similar terms. Section 58, for example, provides that:

"(1) Subject to the provisions of this section, a local authority (a 'contracting authority') may agree with any other local authority (a 'supplying authority') that the supplying authority shall carry out for the contracting authority any activity or service which the contracting authority is required to, or may legitimately, carry out.

(2) An agreement under this section-

(a) may provide for activities or services to be carried out by two or more authorities jointly; and

(b) may include such terms as to payment as the authorities concerned consider appropriate"

The relationship between authorities envisaged by this section is clearly contractual in nature, in view not only of the wording of S58(1)⁸ and the provision regarding payment for work performed contained in S58(2)(b)⁹, but also of the fact that S58(5)¹⁰ protects the status of delegation agreements under S56 of the Local Government (Scotland) Act 1973, which permits one local authority to enter an agreement with another authority for the discharge of its functions.

The scope of S58 and S25 is worthy of some note. The contracts to which it relates may concern "any activity or service which the contracting authority is required to, or may legitimately, carry out"¹¹. The work falling within the ambit of S58 is thus very extensive, and will include work performed under the 1988 Act, as the activities subjected to CCT by those enactments are implicitly,

⁸ See S25(1) of the Welsh Act

⁹ See S25(2) of the Welsh Act

¹⁰ "This section is without prejudice to any other power under or by virtue of which a local authority may arrange for the carrying out of any of their activities or services by another authority". Curiously there is no equivalent provision in the Welsh legislation

¹¹ S25(1) encompasses "services which the contracting council require for the purpose of, or in connection with, the discharge of any of their functions"

at the very least, activities which local authorities "may legitimately carry out"¹². Thus, S58, and also S25, ostensibly empower local authorities to enter into contracts with each other for the performance of work subject to CCT. However, it should be noted that S58(4)¹³ raises the possibility of limitations being placed on the exercise of the S57(1) power:

"The Secretary of State may by regulations make such provision as he thinks fit in relation to the exercise by local authorities of the power conferred by this section and, without prejudice to the generality of the foregoing, such regulations may include provision-

(a) prohibiting or restricting to such extent as may be prescribed the use of the power in relation to such activities or services, or such class or classes of activities or services, as may be so prescribed;

(b) specifying, either generally or in relation to such activities or services, or such classes of activities or services, as may be so prescribed, which authorities may enter into agreements under this section."

It has been indicated that:

"The Government do not ... consider that work subject to compulsory competitive tendering should fall within the powers granted to local authorities under [S58], given that there is a clear private sector market for such work. As such, therefore, the Secretary of State would intend to make regulations excluding CCT contracts from the new arrangements..."¹⁴

If the powers contained in S58(4) and S25(4) are used in this manner, how will the operation of the 1980 and 1980 Acts be affected?

Both S58(1) and S25(1) provide express authority for local authorities to enter into contracts with each other. The corollary to the use of the Secretary of State's powers under S57(4), and S25(4) and (5), to exclude work falling within the scope of the 1988 Act

¹² S25(3)(c) makes this explicit by requiring compliance with the provisions of the 1988 Act where a contract relates to it.

¹³ See also S25(4) and (5) of the Welsh statute.

¹⁴ 1993-4 HL Vol. 556 cols 2024-5. See also Welsh districts vow to fight cross-trading restrictions, 28 April- 5 May 1995 Municipal Journal 14

from the ambit of S58(1) and S25(1) is that local authorities will be prohibited from entering contracts with each other for activities subject to CCT. As authorities will thus lack the capacity to enter into contracts with each other for the performance of such work, the provisions of the 1988 Act establishing tendering regimes for works contracts will be rendered ineffective.

What, however, would be the effect of S58 and S25 upon the works contracts regime if the Secretary of State chose not to use his powers to exclude CCT contracts from its ambit? This necessitates consideration of S58(3):

"Anything requiring to be done by a supplying authority under an agreement under this section shall be treated as one of their statutory functions."¹⁵

In view of the wording of S58(1), which declares that "the supplying authority shall carry out for the contracting authority" the work subject to the contract, it would appear that the works contracts regime established by the 1988 Act is rendered inoperable. The fact that the authority which undertakes the contract acquires a statutory function by virtue of performing the work "for" the other authority would imply that, as it performs the work "for" the contracting authority, the supplying authority acquires no greater powers or duties than are already possessed by the contracting authority. Thus, as a corollary to the work becoming the function of the authority by virtue of S58(3), it must first have been one of the functions of the contracting authority. Indeed, this is made explicit by S25(1) of the Welsh legislation, which refers to such contracts as relating to "the discharge of any of [the] functions" of the authority which lets the contract.

However, S3 of the 1988 Act, excludes agreements to discharge the functions of another local authority from the definition of a works contract: work performed under such agreements will constitute functional work¹⁶. As S58 of the Local Government etc.

¹⁵ S25(6) is couched in almost identical terms

¹⁶ See above for a discussion of the definitions of works contracts and functional work

(Scotland) Act 1994, and S25 of the Local Government (Wales) Act 1994, effectively declare that any contract for the performance of work by one local authority on behalf of another is, in effect, a contract for the discharge of the "contracting authority's" functions, it would appear to be the case that, as regards work under the 1988 Act, inter-authority contracts will henceforth fall into the functional work regime.

It would thus appear that as a result of S58 of the Local Government etc (Scotland) Act 1994, and S25 of the Local Government (Wales) Act 1994, the works contracts regime of the Local Government Act 1988 is rendered inoperable: no inter-authority contract can now satisfy the definition of a works contract contained in that statute. Irrespective of whether the Secretary of State uses his powers to exclude CCT contracts from the ambit of these provisions, the works contract regimes and the works contract/functional work distinction contained in the 1988 Act is frustrated by the wording of S57 and S25. The only difference between the two situations is that, if the Secretary of State utilises the powers contained in S57(4) and S25(4) and(5) in the manner in which the Government has indicated that they will be used, inter-authority contracts relating to activities subject to CCT will be prohibited outright, whereas if the decision is taken not to use those powers, those inter-authority contracts will fall into the functional work regime.

Interestingly, S168 of the Scottish legislation inserts S15A into the Local Government (Scotland) Act 1975, which makes provision regarding the application of surpluses and deficits from DLO and DSO funds, thus ensuring that the argument that inter-authority contracts violate the prohibition on municipal trading is no longer a valid one. However, this provision is of only academic interest if the Secretary of State uses his powers under S57(4) effectively to prohibit such contracts.

In view of the fact that, in Scotland and Wales at least, the works contracts regimes of the 1988 Act has been rendered obsolete, and bearing in mind that Government Ministers have

expressed a desire to revise the position on inter-authority contracts in England, something which would no doubt occur during the course of the CCT moratorium during reorganisation, it would appear that there is little merit in discussing the works contracts regimes further at present, especially if it becomes apparent in the course of time that the revision of the position in England follows the same pattern as that in Scotland and Wales. It therefore remains to discuss the functional work regime contained in the 1988 Act.

TENDERING UNDER THE FUNCTIONAL WORKS REGIME

As the works contracts regime of the 1988 Act would appear to become inoperable in Scotland and Wales once the relevant provisions of the 1994 Acts come into force, and would appear to face an uncertain future once the moratorium on CCT in England ends, we are left to consider the import of the functional work regime. The functional work regime is actually the device by which local authorities are compelled to expose work to competition if they wish to perform it via their own DSO. As such they form the central part of the 1988 Act and merit extensive consideration.

The functional work regime established by the 1988 Act requires that six conditions must be fulfilled before an authority's DSO can perform work: a notice must be published advertising the work to be tendered for; a detailed specification must have been prepared and be available for inspection by potential tenderers; the local authority must invite a specified number of persons who have expressed an interest in performing the work; the DSO must prepare a written bid indicating their wish to carry out the work; in awarding the work to its DSO the local authority is prohibited from doing anything anti-competitive; and in carrying out the work the local authority must adhere to the detailed specification. Each of these conditions will be discussed, although the prohibition of anti-competitive practices will only be dealt with in a cursory manner, as the next two chapters are devoted to consideration of this condition. First, however, the peculiarities of the scheme of sections 6 to 9 of the 1988 Act will be discussed briefly.

SECTIONS 6 TO 8 OF THE LOCAL GOVERNMENT ACT 1988

Section 6(1) of the 1988 Act declares that :

"A defined authority may not carry out functional work falling within a defined activity unless each of the six conditions is fulfilled"

This is elaborated upon by S6(2):

"The conditions mentioned in subsection (1) above are those set out in section 7 below, which has effect subject to section 8 below"

Thus S6 of the 1988 Act prohibits the performance of work unless six conditions contained in S7 are fulfilled. Section 8 elaborates the content of several of those conditions, while both S7 and S8 endow the Secretary of State with powers to issue regulations regarding certain conditions.

Section 6(3), moreover, provides that:

"The section applies only if the works falls within a defined activity, is of such description, is proposed to be carried out by such defined authority or authorities, and is proposed to be carried out on or after such date (not preceding 1st April 1989) as the Secretary of State may by regulations specify and regulations under this section may describe work by reference to a specified proportion of work of a particular description."

It has been contended by some commentators, however, that, since the operation of S6 is predicated on the issue of regulations, and that the relevant delegated legislation establishes both the extent to which authorities were required to phase in CCT between August 1989 and January 1992¹⁷ and the duration of contracts¹⁸, it is arguable that:

¹⁷See Local Government Act (Defined Activities) (Competition) (England) Regulations 1988 S.I. 1371, upon which this contention is based.

¹⁸ See Local Government Act 1988 (Defined Activities) (Specified Periods) (England) Regulations 1988 S.I. 1373, upon which this contention is also based.

"...S6 cannot effectively apply to any future work without further regulation by the secretary of state.

"This would mean the six conditions on which CCT is founded would not apply to any retendering of blue collar activities" ¹⁹

This argument is based on a construction of S6 which is untenable. Section 6(1) of the 1988 Act prohibits the carrying out of any work unless the six conditions are fulfilled, and S6(3) states that those restrictions will only apply to work "after such date....as the Secretary of State may by regulations specify." The regulations introducing a phased programme of competition specify the date by which the six conditions must be complied with by authorities. Following those dates the authorities must comply with the six conditions if they wish to continue to carry out work falling within the defined activities. The regulations specifying the permitted duration of contracts cannot be used as the basis for any argument to the effect that the regulations must be renewed following the completion of the first round of CCT because the terms of those regulations do not simply specify the duration of contracts; instead they regulate one of the conditions set out in S7 of the 1988 Act²⁰. Clearly, as the sole intention of the regulations is to prescribe further the parameters of one of the conditions, there is nothing in them which can be taken as threatening the remaining provisions. Moreover, simply because the regulations effectively set upper and lower limits for the duration of contracts, this does not necessitate the promulgation of new regulations regarding subsequent rounds of competition: once contracts arising from the first round of competition have expired, a local authority is still in the position that it may not carry out functional work falling within a defined activity (at a date now clearly some time after 1st April 1989) unless it conforms with the six conditions contained in S7.

Taking those six conditions as the basis of discussion, the framework of the tendering regimes established by the 1988 Act will now be examined.

¹⁹ Cirell/Bennett, *The Machine Grinds On*, 22/1/93 LGC 20

²⁰ See e.g. the Local Government Act 1988 (Defined Activities) (Specified Periods) (England) Regulations 1988 S.I. 1373, regulation 3

1: PUBLICATION OF A TENDER NOTICE

The act which formally initiates a tendering procedure is the publication of a tender notice. Section 7(1) of the 1988 Act states that:

" The first condition is that, before carrying out the work, the authority published, in at least one newspaper circulating in the locality in which the work is to be carried out and in at least one publication circulating among persons who carry out work of the kind concerned, a notice containing the matters mentioned in subsection (2) below."

Section 7(2) elaborates on the content of such notices:

"The matters are-

- (a) a brief description of the work,
- (b) a statement that during a period specified in the notice any person may inspect a detailed specification of the work free of charge at a place and time specified in the notice,
- (c) a statement that during that period any person will be supplied with a copy of the detailed specification on request and on payment of such charge as is specified in the notice,
- (d) a statement that any person who may wish to carry out the work should notify the authority of that fact within a period specified in the notice, and
- (e) a statement that the authority intend to make, in accordance with the notice, an invitation to carry out the work."

The tender notice issued in relation to 1988 Act work thus fulfils a number of important tasks. Its first, and primary, task is to inform the private sector of the commencement of a tendering procedure in which it may participate. Thus it is necessary to include a brief description of the work as required by S7(2)(a). However, in addition to publication in the local and trade press required by S7(1), authorities must also publish a tender notice in the Official Journal of the European Communities²¹ if the service is one of those currently listed in Annex 1A²². The information demanded by the

²¹ See Dir. 92/50, Articles 15, 17, and Annex IIIC, which prescribes the content of such notices

²² The interrelationship of the current CCT services and those listed in Directive 92/50 is considered above, Chapter 1

Directive is much more extensive than that required by the 1988 Act²³. However, the contents of the tender notice required by S7 also reveal significant features of the tendering process.

The Contents of the Tender Notice

The potential tenderer obviously needs to be informed of the precise nature of the work which he may wish to bid for. For this reason, the authority is required by S7(2)(b) to include in the notice the whereabouts of the detailed specification for the work which may be inspected free of charge²⁴, and must simultaneously be prepared to supply the specification to a prospective tenderer for a fee²⁵. While these provisions are intended to ensure that the potential tenderer is informed of the details of the work to be performed, they also illustrate that, while the issue of the tender notice marks the formal commencement of the tendering process, it is clear that the local authority must undertake a considerable amount of work prior to the notice's publication. The detailed specification must be prepared well in advance of the issue of the tender notice²⁶. However, as most of the elements of the second condition relate to the specification, it will be discussed in greater detail below.

The remaining contents of the tender notice set out in S7(2) are in some respects the most interesting. Taking the last one first, S7(2)(e) requires that the authority must include in the notice a statement to the effect that it will invite tenders from those who notify it of their desire to carry out the work. Section 7(2)(e) is of considerable importance in determining the nature of the tendering procedure and the provisions of Directive 92/50 against which it must be evaluated. Article 1(d) of the directive declares that:

²³ The requirements of the notice published by virtue of Dir. 92/50 will be discussed below

²⁴ The Local Government Act 1992, s9(3)(c) permits the Secretary of State to prescribe the periods during which the specification must be available for inspection. As yet no regulations have been issued.

²⁵ S7(2)(c)

²⁶ On the preparation of specifications see e.g. Cirell/Bennett, *The Tender Trap*, 17/6/94 LGC; Learn to listen, 20/1/95 LGC 20; Ins and outs of specifying, 3/2/95 LGC 20. For an appreciation of the preparations for white collar competition see Kite/Cook, *Countdown to Competition*, 17/9/93 LGC 18, and in relation to legal services see Oakshott, *The Legal Challenge*, 15-21 July 1994 MJ 28

"*restricted procedures* shall mean those national procedures whereby only those service providers invited by the authority may submit a tender."

As S7(2)(e) envisages that tenders will be invited, the tendering procedure must be assessed against the minimum standards set for restricted procedures by Directive 92/50

Time limits for notification of interest by potential contractors

Finally S7(2)(d) provides that the notice must specify a period during which potential tenderers can notify the authority of their desire to carry out the work. This element of the notice, and of the tendering procedure has been further regulated. Section 9(3)(c) of the Local Government Act 1992 provides that the Secretary of State may by regulations specify the maximum and minimum time periods during which potential tenderers must notify local authorities of their interest in securing the contract. Consequently, regulation 2(2) of the Local Government (Direct Services Organisations) (Competition) Regulations 1993 states that the period specified in the notice during which potential tenderers can declare their interest "shall be a period of not less than 37 days commencing on the date on which the notice is published". This time period is consistent with the terms of Directive 92/50²⁷, although, strictly speaking, the directive would not require the application of this time limit to those services which fall within Annex 1B and are thus not subject to the full tendering regime. The regulations, however, do not set a maximum period, S7(4)(a) effectively does so by requiring that invitations to tender, which can only be made after contractors have notified the authority of their interest, must be issued at most six months after the publication of the tender notice²⁸. There are certain peculiarities in the wording of the 1993 Competition Regulations which may limit their scope: this will be discussed below²⁹.

²⁷ See Article 19(1).

²⁸ This maximum limit does not apply to legal, or construction and property, services: see the discussion of the invitation to tender below

²⁹ See chapter 3

It may be convenient at this stage to consider the essentials of the tender notices required by Directive 92/50.

The Requirements of the Services Directive Regarding Tender Notices

Tender notices published in the Official Journal must indicate, amongst other things, whether the contract is to be awarded by open, restricted or negotiated procedure³⁰. As the UK's CCT legislation centres on a restricted procedure, we may limit consideration to those provisions regarding notices issued for restricted procedures. Amongst other things notices must specify the name, address, telephone, telex and fax number of the contracting authority³¹, the range of potential contractors who will be invited to tender³², the final date for dispatch of invitations to tender, information required from the tenderer about his financial and technical abilities, the criteria for the award of the contract³³ where it is to be awarded to the most economically advantageous tender, and, perhaps most crucially, the description of the work to be tendered for.

The next element of the tendering procedures relates almost exclusively to the specification.

2: THE AVAILABILITY AND CONTENT OF THE SPECIFICATION

The second condition set out in the 1988 Act which must be fulfilled before a local authority may undertake work falling within a defined activity relates to the availability and content of the specification. Section 7(3) states that:

- "(a) the place, time and charge specified in the notice are reasonable,
- (b) before carrying out the work, the authority made a detailed specification of the work available for inspection, and copies of it available for supply, in accordance with the notice, and

³⁰ Directive 92/50, Article 15(2)

³¹ Directive 92/50, Annex III. C

³² Directive 92/50, Article 27(2)

³³ Directive 92/50, Article 36(2)

(c) the detailed specification includes a statement of the period during which the work is to be carried out"

The second condition complements the first: whereas the first condition seeks to prescribe the contents of the tender notice, the second condition imposes further requirements as to the availability and contents of the specification, and the period for notifying interest. Section 7(3)(a) simply requires that the place and time at which the specification is available for inspection are reasonable³⁴, while S7(3)(b) requires that the detailed specification is indeed available at the time and place mentioned in the notice: this ensures that the statements contained in the tender notice are given effect to by imposing a separate, though related, duty regarding the availability of the specification.

The statement as to the proposed duration of the work

In S7(3)(c) we are presented with a provision relating not to the availability of the specification, but to its content. By virtue of S7(3)(c), the specification must include a "statement of the period during which the work is to be carried out". It is worth noting that where Directive 92/50 applies in its entirety the tender notice published in the O.J.E.C. should include this information³⁵. This aspect of the specification is further regulated by S8(1), which states:

"If the Secretary of State so provides by regulations, the second condition shall not be treated as fulfilled if the period stated by virtue of section 7(3)(c) above-

- (a) exceeds a period specified in the regulations;
- (b) is less than another period so specified."

It must be emphasised that the duration of contracts is not set *per se* by regulations issued under this power: instead the Secretary of State issues regulations which require that in order to fulfil one of the conditions set by S7 the authority awarding the contract must include a statement in the specification relating to the contract

³⁴ See *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374

³⁵ Article 17, Annex III C

duration which falls within the parameters set by the regulations³⁶. In effect this gives a local authority some discretion regarding the duration of the contract, but imposes a duty to state the intended duration in the specification. This emphasises the importance of the specification to the tendering process, and the fact that the specification must be prepared well in advance of the notice which marks the formal commencement of the tendering procedure.

Factors which must be taken into account during the preparation of the specification

One thing which sections 7 and 8 of the 1988 Act emphasises is the central importance of the specification. What may be lost sight of in view of the apparent chronology of the conditions set out in S7 of the 1988 Act is that the specification is prepared in advance of the CCT process being initiated. The specification is perhaps the most important document in the course of the competitive tendering process on account of the fact that the practice is for the detailed specification to be, in essence, a draft of the contract³⁷. The most cogent description of the detailed specification is that proffered by one legal officer who described it as being simply a copy of the final contract with blank spaces where the costs of the work and the name of the tenderer to whom the work is awarded will be filled in³⁸. Whenever this course is followed the specification must necessarily address a multitude of issues. It will set forth, for example, the conditions on which the contract will be entered into, define the task to be performed, the process for variation of the contract and its subject matter, matters of general contract administration such as default and contract monitoring systems, payment calculation, transfer of undertakings and equal opportunities clauses, performance bonds and determine the geographical area in which the work is to be performed. The content of a specification is therefore complex and very technical. This raises two important points about their preparation: documents of

³⁶ See e.g. the Local Government Act 1988 (Defined Activities) (Specified Periods) (England) Regulations 1988 S.I. 1373; Local Government Act 1988 (Defined Activities) (Specified Periods) (Scotland) Regulations 1988 S.I. 1414

³⁷ Interview with officers of Strathclyde RC, 1/12/93, 30/4/95; interview with officers of Stirling DC 19/4/94, 10/5/95

³⁸ Interview with officers of Strathclyde RC legal services, 1/12/93

some complexity need long and thorough preparation, and the technical nature of specifications reduces the opportunity for local authority members to be involved in the process.

Given that the specification is the means of defining the work which is to be tendered for and the geographical location in which it is to be performed³⁹, considerable care must be taken in packaging the work. Numerous decisions have to be taken regarding the authority's service requirements. First it needs to quantify the service which it provides. This is perceived to be one of the great benefits of CCT, as it was previously the case that authorities very often did not appreciate the true extent or cost of the work which was being performed⁴⁰. Consequently the authority needs to evaluate the level of service which it needs to provide in order that it may accurately prepare the specification. Secondly, at this stage the nature of the work included in the specification must be considered: for example, does an authority wish to expose street cleaning and refuse collection to competition in the one package, or does it wish to use its power under S2(7) of the 1988 Act to treat work as falling within a defined activity when it would otherwise fall outwith the scope of CCT. The preparation of a specification is, therefore, a long⁴¹ and involved process.

The personnel involved in preparing the specification

The second issue is: who prepares the specification? It was apparent at a fairly early stage that:

"The introduction of competition has largely been an officer led exercise, because of the detailed work that has been involved, and the speed with which it has been done. The

³⁹ In some instances the specification may divide a local authority's area into several parts and permit potential tenderers to tender for all of the DSO's work, or simply the work to be performed in one or more of the authority's constituent parts. The guidance on anti-competitive practices addresses the issue, and will be discussed in Chapter 3. However, the indications are that neither local authorities nor tenderers are totally happy with tendering for work packaged in this way: interview with officers of Stirling DC 19/4/94

⁴⁰ Interview with officers of Strathclyde RC 1/12/94; see also Walsh, *Competitive Tendering for Local Authority Services: Initial Experiences*, 1991, at 14.3, 14.8

⁴¹ It was recently estimated that it would take nine months to prepare a specification for legal services CCT: see Oakshott, *The Legal Challenge*, 15-21 July 1994 *Municipal Journal* 28

continuing management of competition is also likely to be led by officers.....with members only becoming involved at the level of general oversight and when particular problems and issues arise."⁴²

Two years later it was commented that:

"The pattern of member involvement had changed over the course of this research with a significant reduction in member involvement. The involvement was highest in the early stages when authorities were considering how they should deal with the issue, and when clear policy had not been developed. There was also interest in the process of setting specifications and letting tenders. The central mechanisms established for member involvement, such as panels and sub-committees of the Policy Committee, tended to persist, but with a reducing role"⁴³

It was considered unlikely that there would be a resurgence of member interest in subsequent rounds of CCT as the process of dealing with CCT has become institutionalised in local authorities⁴⁴. In some cases, officers have even made conscious attempts to reduce member involvement⁴⁵. It is obvious, however, that members are finding themselves increasingly marginalised in the course of the CCT process, including the preparation of specifications. The preparation of specifications is thus a process increasingly left in the hands of officers. Typically, preparation of specifications is conducted by a local authority's legal advisors and the head officer of the service unit whose work is being exposed to competition⁴⁶. The head officer of the service unit, in his role as head of the client unit ⁴⁷, may assume the role of "client agent", essentially an expert adviser whose role is to ensure that the specification adequately reflects the needs of the authority in relation to the service in question, in the course of the

⁴² Walsh, *Competitive Tendering for Local Authority Services: Initial Experiences*, 1991, at 14.12

⁴³ Walsh and Davis, *Competition and Service: the Impact of the Local Government Act 1988*, 1993, at 3.22

⁴⁴ Ibid.

⁴⁵ Ibid., 3.25

⁴⁶ Interview with officers of Strathclyde RC, 1/12/93, 30/3/95; Stirling DC 19/4/94, 10/5/95

⁴⁷ The formalisation of the client/contractor split will be discussed in chapter 3

specification's preparation⁴⁸. The authority may also consult its personnel department on matters relating to the workforce, and occasionally external consultants may be engaged where it is felt that their expertise is relevant and useful⁴⁹. The process of preparing a tender specification is thus very much an officer led one, with a number of officers and departments being involved in its compilation.

The impact of the EC public procurement regime on the content of specifications

The technical nature of the specification is further emphasised by the requirement that its contents must meet the constraints imposed by European Community law⁵⁰. Thus the contents of specifications must not, for example, contravene the prohibition of discrimination on the grounds of nationality contained in Article 6 of the EC Treaty, restrict the free movement of persons by requiring the use of local labour, or by attempting to frustrate the attempts of a contractor from another member state to bring his own workforce⁵¹, restrict the free movement of goods by imposing a restriction on the use of goods produced in other member states in contravention of Article 30⁵², or restrict the right to freedom of establishment contained in Article 52 and the right to free movement of services in contravention of Article 59⁵³. In addition specifications must conform to the parameters set by the EC public procurement regime.

⁴⁸ This practice is followed by Stirling DC, for example; interview of 19/4/94

⁴⁹ Interviews with officers of Strathclyde RC 1/12/93, 30/3/95; Stirling DC 10/5/95

⁵⁰ On the impact of the EC public procurement regime upon the preparation of specifications see generally Bickerstaff, *Applying the E.C. Rules on Standards and Specifications in Public and Utilities Procurement*, (1994) 3 P.P.L.R. 153

⁵¹ *Rush Portuguesa Lda v Office National d'Immigration*, Case C-113/89 [1990] E.C.R. I417

⁵² See e.g. *Du Pont de Nemours SpA v Unita Sanitaria Locale No.2 Di Carrara*, case C-21/88, [1990] ECR 889, [1991] 3 CMLR 25; *Laboratori Bruneau Srl v Unita Sanitaria Locale RM/24 de Monterondo*, Case C-351/88

⁵³ *Commission v Italy*, case C-3/88, [1991] 1 CMLR 115; *Commission v Italy*, Case C-272/91, unreported

The provisions contained in the Services Directive regarding technical specifications⁵⁴, have as their aim a desire to ensure that specifications are non-discriminatory and ensure Community-wide competition. Directive 92/50 declares that:

"Without prejudice to the legally binding national technical rules and in so far as these are compatible with Community law ... technical specifications shall be defined by the contracting authorities by reference to national standards implementing European standards or by reference to European technical approvals or by reference to common technical specifications."⁵⁵

There are a series of definitions surrounding the Articles relating to technical specifications. Basically a technical specification is defined as being all of the technical descriptions included in the tender documents which define the work or activity which is to be performed, and must include matters such as, for example, the levels of quality, performance, safety, the rules relating to costing, and "all other technical conditions which the contracting authority is in a position to prescribe"⁵⁶. A specification referring to a national standard implementing a European standard will be, applying the relevant definition⁵⁷, a specification approved by a recognised national standardising body for repeated and continuous application, compliance with which is in theory not compulsory, which in turn implements the standard approved by the relevant European body⁵⁸. A specification referring to a European technical approval is essentially a specification based on a favourable technical assessment of the fitness for use of a product based on the fulfilment of essential requirements for building works, based on the characteristics and use of the product: this approval shall be made by the body designated for this purpose by the Member State⁵⁹. This form of specification obviously relates to construction related

⁵⁴ See Directive 92/50, Article 14 and Annex II.

⁵⁵ Directive 92/50, Article 14(2)

⁵⁶ Annex II(1)

⁵⁷ See Annex II(2) and (3)

⁵⁸ The bodies which may set the European standards are: the European Committee for Standardisation (CEN), the European Committee for Electrotechnical Standardisation (Cenelec), or the European Telecommunications Standards Institute (ETSI): see Annex II(3)

⁵⁹ See Annex II(4)

services and construction work. A specification may refer to a common technical specification, which is one laid down in accordance with a procedure recognised by the Member States to ensure uniform application throughout the European Union and published in the Official Journal of the European Communities⁶⁰.

The circumstances in which authorities may depart from the use of standards implementing European standards, technical approvals and common technical specifications in drafting a specification are closely defined and limited. There are four circumstances set out in the Services Directive: if the approvals, standards or common technical specifications do not facilitate conformity, or conformity with the standards is technically impossible⁶¹; where adherence would conflict with other EC legislation, particularly that on type approval for telecommunications terminal equipment, and standardisation in the fields of information technology and telecommunications⁶², although an authority which avails itself of these derogation's must state its reasons for doing so in the contract notice published in the O.J.E.C.⁶³; if the use of the standards would result in the procurement of equipment incompatible with that already in use, or entail disproportionate costs or technical difficulties⁶⁴; and if the project in question is of a genuinely innovative nature⁶⁵.

However, the Directive also regulates what should happen where no European standards, technical approvals, or common technical specifications exist. If this is the case, technical specifications may be defined by reference to national technical standards which are recognised as complying with the basic requirements listed in EC Directives on technical harmonisation, and the procedures laid down in those directives, particularly Directive

⁶⁰ See Annex II(5)

⁶¹ Article 14(3)(a)

⁶² Article 14(3)(b)

⁶³ Directive 92/50, Article 14(4)

⁶⁴ Article 14(3)(c). However, this derogation is only permitted where it is part of a clearly defined, recorded, strategy to change over to European standards, technical approvals or common technical specifications

⁶⁵ Article 14(3)(d)

89/106⁶⁶, or by reference to national technical specifications relating to the design and method of calculation and execution of works and use of materials⁶⁷, or by reference to other documents, by which is meant, in order of preference: national standards implementing international standards accepted by the country in which the contracting authority is situated; other national technical standards and technical approvals of the contracting authority's state; and any other standard⁶⁸.

Furthermore, unless the subject matter of the contract necessitates doing so, specifications generally may not mention a particular make of product, or the source of a process lest this would favour or eliminate particular tenderers⁶⁹, although for the sake of precision and clarity trade marks, patents, or the specifics of a product's origin or production may be enumerated provided the particular description is accompanied by the words "or equivalent".

The process of preparing a specification would thus appear to be both very legalistic, and also very much dependent on the skills of the officers acquainted not only with the practice of their department but also with the wider practice of the trade or profession which is the subject of the tendering exercise. The legalistic nature of the process of drafting a specification is emphasised by the myriad provisions of the Directive regarding technical specifications.

The specification is thus not only a document central to tendering procedures conducted by virtue of the 1988 Act, but is also a far more complex, and more heavily regulated, document than the references to it in the Act would suggest.

⁶⁶ Article 14(5)(a)

⁶⁷ Article 14(5)(b)

⁶⁸ Article 14(5)

⁶⁹ Article 14(6). See also *Commission v Netherlands* Case C-359/93, a case under the old supplies directive, Dir. 77/62, for an example of a situation where reference to a particular product was held to be unlawful

3: INVITATION TO TENDER

The third condition prescribed by the Local Government Act 1988 is contained in S7(4), which declares that:

"...if any person notified the authority in accordance with the statement under the subsection 2(d) above, the authority made an invitation to carry out the work in accordance with the following rules-

(a) the invitation was made by the authority before carrying out the work, and not less than 3 nor more than 6 months after complying with the first condition [i.e. publication of a tender notice];

(b) if more than three persons who are not defined authorities notified the authority, at least three of them were invited;

(c) if less than four persons who are not defined authorities notified the authority, each of them was invited;

(d) if a defined authority or defined authorities notified the authority, such one or more (if any) of them as the authority decided was invited."

The 1988 Act, however, endowed the Secretary of State with two powers to regulate specific elements of this condition further. The first, contained in S7(5), permits a variation of the number of persons who must be invited to tender, and will be discussed below. The second provision is contained in S8(2) which states that:

"If the Secretary of State so provides by regulations, the third condition shall not be treated as fulfilled unless-

(a) the contents of any invitation included prescribed matters (which may relate to the time allowed for responding, the method of responding, or otherwise), and

(b) if any response was made to any invitation, before carrying out the work the authority complied with prescribe requirements as to responses (which may include requirements to disregard certain responses, requirements about the keeping or opening of responses, or otherwise);

and 'prescribed' here means prescribed by the regulations"

The power contained in S8(2)(a) has been used in order to specify that the period during which contractors must reply to an invitation to tender shall be a period of not less than 40 days, commencing on

the date on which the invitation was issued⁷⁰. This time limit would appear to reflect that contained in Directive 92/50⁷¹.

Three issues arise in relation to this stage of the process. The first relates to the status of time limits, and how the UK and European legislation interact on this matter. The second issue requiring consideration regards the requirement in domestic legislation that a given number of contractors should be invited to tender. Thirdly, how are those contractors who are invited to submit tenders selected? It must be emphasised once again, however, that in relation to certain services presently subject to CCT under the provisions of the 1988 Act, the provisions of Directive 92/50 do not apply in their entirety: the services falling into this category are, most notably, schools and welfare catering, other catering (basically the provision of meals in canteens)⁷², and management of sports and leisure facilities.

Time limits for issuing invitations to tender

The first issue to be addressed, the time limits applicable to this stage of the process, can be dealt with relatively briefly. The 1988 Act requires that the invitation to tender should be made not less than three, nor more than six, months after the publication of the tender notice⁷³. There are a number of interesting points to note about this period. First, it is calculated from the date of publication of the tender notice, not from the end of the period during which contractors can notify the authority of their interest, and thus runs concurrently with the period during which contractors can notify their interest. As the period during which contractors must indicate their interest must be not be less than 37 days⁷⁴, an authority using the minimum period of 37 days for receiving notifications of interest, and the minimum of three months from the publication of the tender notice for inviting tenders will have nine weeks to decide which contractors to issue invitations to. Secondly, Directive

⁷⁰ Local Government (Direct Service Organisations) (Competition) Regulations 1993 S.I. 848, Regulation 2(3)

⁷¹ See Article 19(3)

⁷² See Part II, Chapter 1 on this distinction

⁷³ S7(4)(a)

⁷⁴ S7(2)(d) as amended by 1993 S.I. 848, Regulation 2(2)

92/50 does not specify a time limit corresponding to that contained in the 1988 Act. While Directive 92/50, for example, sets a minimum time limit of 40 days for the receipt of tenders after the invitation to tender has been issued⁷⁵, it does not attempt to specify when tenders should be invited by reference to the tender notice's publication, although if one adds the minimum period for notification of interest (37 days) and the minimum period for responses to an invitation to tender (40 days) which it sets, the combined figure of 77 days is significantly different from the minimum of three months which must elapse between publication of a tender notice and the issue of invitations to tender set by S7(4)(a). Thirdly the Secretary of State has sought to use the Guidance on anti-competitive practices to constrain the exercise of the discretion which authorities enjoy regarding time limits by virtue of the provisions of the 1988 Act⁷⁶. As the Secretary of State has attempted to regulate this aspect of local authorities' activities by defining certain conduct as anti-competitive, this matter will be addressed below⁷⁷. Finally, it should be noted that the time limits for the issue of an invitation to tender set by S7(4)(a) will not apply to CCT for legal services⁷⁸, or construction and property services⁷⁹. However, as the Local Government (Direct Service Organisations) (Competition) Regulations 1993 apply, which specify that contractors must be allowed a minimum of 37 days from the date of the tender notice's publication to notify their interest⁸⁰, and a minimum of 40 days for replies to invitations to tender⁸¹, the minimum period which may elapse from publication of a tender notice to receipt of tenders is, theoretically, 77 days, which is compatible with Directive 92/50, even though legal services are

⁷⁵ Article 13(3) of Directive 93/37; Article 19(3) of Directive 92/50. In certain circumstances this period may be reduced to 26 days: see Article 14(4), Article 19(4) respectively.

⁷⁶ See DoE Circular 10/93, Scottish Office Environment Department Circular 13/93, Welsh Office Circular 40/93, paragraphs 14-16

⁷⁷ See Ch 4

⁷⁸ Local Government Act 1988 (Competition) (Defined Activities) Order 1994 S.I. 2884, regulation 3(3)

⁷⁹ Local Government Act 1988 (Competition) (Defined Activities)(Construction and Property Services) Order 1994 S.I. 2888, regulation 3(3)

⁸⁰ 1993 S.I. 848, regulation 2(2)

⁸¹ *Ibid.*, regulation 2(3)

listed in Annex 1B, and thus not subject to all of the Directive's provisions

Although this matter has been mentioned above in adverting to the discrepancies in the temporal limits set by the 1988 Act, the minimum period for receiving replies to an invitation to tender must be discussed briefly. The Secretary of State has used his powers under S8(2)(a) of the 1988 Act to specify the minimum period for receiving replies to an invitation to tender as 40 days⁸². This is compatible with the EC services directive⁸³

The number of invitations to tender which should be issued

The next issue to be considered is the requirement in the 1988 Act that a given number of contractors should be invited to tender. Section 7 of the 1988 Act essentially provide that at least three potential contractors who are not defined authorities must be invited to tender, as must any local authority which has expressed an interest in tendering. However, S7(5) of the 1988 Act reserves to the Secretary of State the power to issue regulations altering the number of contractors who must be invited to tender. As yet these powers have not been exercised, and the adoption of the figure of three tenderers appears to fail to give effect to the provisions of the Services directive, which requires that in a restricted procedure the number of potential contractors invited to submit a tender by a contracting authority should be in the range of five to twenty, or such number as will ensure adequate competition⁸⁴. However, the Secretary of State has attempted to use his powers under S9 of the Local Government Act 1992 to specify in the Guidance on anti-competitive practices that a different number of tenderers should be invited. Consequently it is more convenient to discuss the precise legal status of the confused domestic requirements relating to the number of tenders to be invited in the course of discussing the Guidance⁸⁵.

⁸² Ibid.

⁸³ Directive 92/50, Article 19(3)

⁸⁴ Directive 92/50, Article 27(2)

⁸⁵ See Chapter 4

An analysis of the available figures relating to CCT in England would, however, appear to indicate that the requirements of the Directive and the 1988 Act are in many instances purely academic⁸⁶. The available data indicates that, taking the years 1989 to 1992 as a whole, on average 4.4 potential contractors expressed an interest in being awarded a contract, and 2.3 contractors were invited to bid. However, it must be emphasised that, in spite of 2.3 contractors being invited to bid, on average only one external bid was received for each contract. The study in question found that there had been a decline in the number of contractors expressing an interest in being awarded CCT contracts between 1989-90 and 1991-2. In the former year there had been, on average, 5.2 contractors expressing an interest in being awarded each contract, 2.5 invitations to tender issued for each contract, and 1 external bid received. In 1991-2, however, the corresponding figures were: 3.7 expressions of interest per contract, 2 invitations to tender, and 0.95 bids received. It would appear that there are rarely a sufficient number of expressions of interest to enable use of the range of five to twenty invitations to tender set out in the Services Directive⁸⁷. There would appear, however, to be, on average, a sufficient number of expressions of interest in being awarded each contract to satisfy the requirement that at least three contractors should be invited to tender. Why, therefore, does it appear that only 2 invitations to tender are issued for each contract? This leads to consideration of the third issue: the selection of the contractors invited to submit tenders.

Selection of those contractors who will be invited to submit tenders

Before issuing invitations to tender it is the practice to issue a questionnaire to all potential contractors who express an interest in being awarded work. Such questionnaires will cover a number of areas. First, they will generally seek information about the contractor: for example, whether it is a company, firm, or sole trader; the names of directors or partners; whether partners or directors, or their relatives, have recently been employed by the

⁸⁶ Walsh and Davis, *Competition and Service: The Impact of the Local Government Act 1988*, table 7.2

⁸⁷ Directive 92/50, Article 27(2)

authority; if a company is a member of a group of companies, the name of other companies in the group. Secondly, technical references and resources: these questions will generally relate to the performance of the contractor in similar contracts, the employment profile and qualifications of staff, quality assurance, and technical references provided by previous clients. Thirdly information as to the contractor's financial status: for example, the name of the person responsible for financial matters, the name and address of bankers, and whether a reference may be obtained from them, the provision of accounts and annual reports, whether there is any outstanding claim or litigation against the company, the VAT registration number, and details of employers liability and third party insurance. Fourth, questions will be asked about the contractor's compliance with equal opportunities legislation such as the Race Relations Act 1976, the Sex Discrimination Act 1975, and the Disabled Persons (Employment) Act 1944. In addition, questions may be asked about the contractor's health and safety record, and the size of contract which the contractor is interested in obtaining. Only if satisfactory replies are given to these questions, and the appropriate references obtained, will an invitation to tender be made, although, as was pointed out above, not every invitation to tender results in a tender being submitted.

Domestic legislation does not always regulate tender questionnaires in an obvious way: the non-commercial considerations regime contained in Part II of the 1988 Act limits the scope of questions regarding the terms and conditions of employment, or industrial relations, amongst other things⁸⁸, while the Guidance on anti-competitive practices states that questionnaires should not be unnecessarily detailed, and should only seek information relevant to the work in question⁸⁹. However, many of the questions contained in the questionnaires can rely on the EC public procurement regime for their authority.

⁸⁸ See S17. The non-commercial considerations regime will be discussed at length in Chapter 6

⁸⁹ DoE Circular 10/93, Scottish Office Environment Department Circular 13/93, Welsh Office Circular 40/93, paragraph 6. See Chapter 4 for a discussion

The Services Directive's provisions on selection of tenderers

Directive 92/50⁹⁰ provides that potential contractors may be excluded from participation in certain circumstances, and that the suitability of contractors to perform work may be assessed by reference to certain financial and technical criteria. Articles 29 to 35 of the Services Directive concern the criteria for qualitative selection, and relate the circumstances in which potential contractors can be excluded from participation in a tendering procedure.

Thus a contractor who is bankrupt or is the subject of bankruptcy proceedings, has been guilty of professional misconduct by a judgement which has the force of *res judicata*, been guilty of grave professional misconduct proved by any means which the contracting authority can justify, has failed to fulfil his obligations under the social security laws, or has failed to pay taxes in accordance with the laws of either the country in which he is established, or the country in which the contracting authority is situated, may be excluded from participation in the award procedure⁹¹. In addition, a potential contractor may be asked to prove his membership of a trade or professional organisation, if that is required by his country of origin in order that he may perform a work or service⁹².

A contractor may be asked to show proof of his financial and economic standing by means of at least one of the following: bankers references, presentation of balance sheets or a statement of turnover in the previous three years⁹³, although this list is not exhaustive, and other sources may be used⁹⁴. The Directives also permit evaluation of contractors' technical and professional ability, which may be assessed by seeking evidence, among other things, of the educational and professional qualifications of those in

⁹⁰ Article 23

⁹¹ Directive 92/50, Article 29

⁹² Article 30

⁹³ Article 31

⁹⁴ See *Construction et Entreprises Industrielles (CEI) and others v Societe Cooperative "Association Intercommunales pour les Autoroutes des Ardennes"* and others, Cases 27-29/86, [1987] ECR 3347, [1989] 2 CMLR 224, at paragraphs 8-10

managerial positions, and of those involved in service provision, by listing the services performed in the last three years, a statement of average manpower over the previous three years, and an indication of the amount of work which may be sub-contracted⁹⁵. Directive 92/50 also requires that authorities seeking quality assurance certification from contractors must accept either certificates based on the relevant European standards, or evidence of equivalent quality assurance measures supplied by contractors⁹⁶. It should be noted that it is for the contracting authority to set the level of financial and economic standing which it finds acceptable for potential contractors to participate in a tendering procedure⁹⁷.

A contractor who is guilty of serious misrepresentation in respect of the information given, or fails to supply information, may be excluded from participation in the awards procedure⁹⁸, and authorities may invite potential contractors to supplement certificates or documents submitted during this process, or to clarify them⁹⁹. The various provisions of the Directives appear, on examination, to be sufficiently clear, precise, and unconditional to be directly effective.

It would appear that a substantial correlation exists between the questions commonly asked by local authorities in the course of evaluating which potential contractors to invite to submit tenders, and the provisions of the Directive regarding criteria for qualitative selection. Thus, in spite of the fact that several services subject to CCT under the 1988 Act are not as yet subject to the provisions of the Services Directive in its entirety, the practice adopted in selecting which potential contractors to invite to tender generally seems to be consistent with what is permitted by the Directives.

⁹⁵ Article 32. These provisions were held to be directly effective in *Gebroeders Beentjes BV v The Netherlands*, Case 31/87, [1988] ECR 4635, [1990] 1 CMLR 287, paragraphs 38-44

⁹⁶ Directive 92/50, Article 33

⁹⁷ *CEI and others v Societe Co-operative "Association Intercommunales pour les Autoroutes des Ardennes" and others*, Cases 27, 28 and 29/86, [1987] ECR 3347, [1989] 2 CMLR 224 at paragraphs 11- 18; *Gebroeders Beentjes BV v The Netherlands*, Case 31/87, [1988] ECR 4635, [1990] 1 CMLR 287 at paragraph 17

⁹⁸ Article 29(g)

⁹⁹ Article 34

However, by virtue of S9 of the Local Government Act 1992 the Secretary of State possesses powers to regulate the qualitative evaluation of potential contractors by defining certain practices as anti-competitive: the compatibility of the Secretary of State's powers with the Directives will be discussed below¹⁰⁰.

Once a decision has been taken as to which of the contractors will be invited to tender, the unsuccessful contractors who have notified the authority of their interest in being awarded the contract must be notified of the authority's decision forthwith¹⁰¹. If the contractor who has been excluded from the award process makes a written request, S20 of the 1988 Act provides that he must receive a written statement of the reasons why he has not been invited to submit a tender. Similarly, Article 12(1) of Directive 92/50, where it applies, provides that a contractor whose application to participate in an award procedure has been rejected must receive reasons for the rejection of his application within 15 days of the receipt of his written request for them.

The issue of tender documents accompanying invitations to tender

There is one further important aspect of the issue of an invitation to tender which must be addressed. When an invitation to tender is issued it will normally be accompanied by a range of other documents relating to the tendering process and contract in question, which are generally referred to as the "contract documents". The contract documents will almost invariably contain a range of additional conditions relating to the tendering process which, if accepted by potential contractors will normally lead to the establishment of contractual obligations between the authority and the tenderer as regards the conduct of the tendering process itself¹⁰². Thus an authority may stipulate in the contract documents the conditions on which it will consider tenders, that the

¹⁰⁰ See, in particular, Chapter 3 on anti-competitive practices, and Chapter 4 on the Guidance

¹⁰¹ 1988 Act, S20: this provision is contained in Part II of the 1988 Act and will be discussed at length in Chapter 6, which is devoted to the non-commercial considerations regime

¹⁰² See e.g. *Ettrick and Lauderdale D.C. v Secretary of State for Scotland* 1995 SLT 996; *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 3 All ER 25

submission of a tender will indicate acceptance of those conditions, and state that a failure to comply with the conditions will justify rejection of the tender¹⁰³. However, it must also be realised that the stipulation of tendering conditions generally will also impose contractual obligations on local authorities to comply with the conditions for the conduct of the tendering process themselves¹⁰⁴. Perhaps more importantly, certain provisions of the Guidance on anti-competitive practices, particularly those relating to the packaging of work, may impinge upon the freedom of local authorities to stipulate certain tendering conditions¹⁰⁵.

Part I of the 1988 Act does not directly address the content of the contract documents, although the Guidance on anti-competitive practices issued pursuant to S9 of the 1992 Act does¹⁰⁶. However, the Guidance only concerns itself with the level of detail of the schedules of rates contained in the tender documents, and not with the substance of tendering conditions. Significantly, however, S20 of the 1988 Act requires that where a tender has either not been accepted¹⁰⁷, or has been unsuccessful¹⁰⁸, the tenderer should be informed of the fact forthwith, and must be supplied with a written statement of reasons if he requests them in writing. This would certainly enable a potential contractor to ascertain if his tender has been rejected for a failure to comply with the tendering conditions, or whether his tender has simply been unsuccessful on its merits.

Where it applies in its entirety Directive 92/50, however, does stipulate some of the matters which must be contained in the contract documents. Thus tender documents must state the criteria which a contracting authority intends to apply in selecting the most economically advantageous tender¹⁰⁹, and indicate the minimum

¹⁰³ This was essentially the situation at issue in *Ettrick and Lauderdale DC v Secretary of State for Scotland*, op. cit.: see Chapter 3 for a discussion

¹⁰⁴ See *Blackpool and Fylde Aero Club v Blackpool Borough Council* op. cit.

¹⁰⁵ See Chapter 4 for a discussion

¹⁰⁶ DoE Circular 10/93, Scottish Office Environment Department Circular 13/93, Welsh Office Circular 40/93 paragraphs 21-2

¹⁰⁷ S20(2)(b)(ii): discussed infra, Chapter 5

¹⁰⁸ S20(2)(b)(iii): See Chapter 5

¹⁰⁹ Article 36(1)

specifications to be respected by tenderers who may submit variations on the specification where the contract is to be awarded on the basis of the most economically advantageous tender¹¹⁰. Moreover, a contracting authority may ask a tenderer to indicate the share of the contract which he intends to subcontract to third parties¹¹¹, and may state the relevant authority from whom information about employment protection legislation may be obtained¹¹². Like S20 of the 1988 Act, the Directive also requires unsuccessful tenderers to be informed in writing of the reasons why his tender has been unsuccessful when they make a written request for that information¹¹³

While this may explain the process by which potential contractors are invited to submit tenders, and the potential implications of the issue of an invitation, it does not explain the role of the local authority's DSO in competing for the work.

4: THE IN-HOUSE BID

The 1988 Act provides by S7(6) that:

"The fourth condition is that before carrying out the work the authority, through their direct labour organisation or a similar organisation, prepared a written bid indicating their wish to carry out the work"

Section 8(3) of the 1988 Act contains provisions regarding the calculations involved in preparing the DSO bid. In addition S8(4) of the 1988 Act states that:

"If the Secretary of State so provides by regulations, the fourth condition shall not be treated as fulfilled unless before carrying out the work the authority complied with requirements prescribed by the regulations as to the bid (which may include requirements about the preparation, keeping or opening of the bid, or otherwise)."

¹¹⁰ Article 24(1)

¹¹¹ Article 25

¹¹² Article 28

¹¹³ Article 12(1)

This power has not as yet been used

Although these provisions appear to deal with comparatively innocuous matters such as the method of costing DSO bids, they actually represent the essence of CCT. It must be remembered, to borrow the formulation adopted in the long title of the 1988 Act, that the statutes examined here are intended "to ensure that local and other public authorities undertake certain activities only if they can do so competitively". The 1988 Act only applies if a DSO participates in the tendering process. If a DSO is not willing to perform the work, the authority will be forced to award a contract to a private sector contractor, and awards procedures will fall within the remit of the Public Services Contracts Regulations 1993¹¹⁴.

It is convenient to note at this point that, as with decisions regarding the invitation to tender, and the acceptance of tenders, when work is awarded to a DSO, the unsuccessful tenderers should be informed of the decision not to enter into a contract with them "forthwith"¹¹⁵. Where an unsuccessful tenderer requests it in writing, he should receive a written statement of the reasons why his tender has been unsuccessful from the authority. There is a similar duty imposed on authorities by Article 12(1) of Directive 92/50, where the Directive applies in its entirety.

5: THE PROHIBITION OF ANTI-COMPETITIVE PRACTICES

Section 7(7) of the 1988 Act prohibits conduct in the course of reaching the decision that a DSO should carry out work "having the effect or intended or likely to have the effect of restricting, distorting or preventing competition". The prohibition of anti-competitive practices was handicapped by the failure of either the 1988 Act to define what constituted an anti-competitive practice, although S8(5) did permit the Secretary of State to issue regulations requiring documents to be prepared certifying that the requirements regarding invitations to tender have been complied

¹¹⁴ 1993 S.I. 3228

¹¹⁵ 1988 Act, S20; discussed at length in chapter 6

with in order that it can be shown that the authority have acted competitively. This power has never been used. Only by an investigation of the notices issued by the Secretary of State using his powers under S14 of the 1988 Act was it possible to gain some indication of what constituted an anti-competitive practice¹¹⁶. However, this failure was addressed by S9 of the Local Government Act 1992, which contains several regulation-making powers, and authorises issue of the Guidance on anti-competitive practices. Due to the central importance of this issue, and of the impact of S9 of the 1992 Act, the next chapter will be devoted to discussion of anti-competitive practices.

6: THE DUTY TO COMPLY WITH THE SPECIFICATION

Section 7(8) of the Local Government Act 1988 states that:

"The sixth condition is that in carrying out the work the authority comply with the detailed specification of it mentioned in subsections (2) and (3) above."

Unlike the other conditions, this one does not relate to the tendering process, but to the performance of work. However, it must be remembered that S6(1) prevents an authority from carrying out work subject to the 1988 Act unless each of the six conditions contained in S7 is complied with: by requiring that the specification must be complied with after work is awarded to a DSO, authorities are prevented from frustrating the purpose of CCT by submitting a tender in accordance with the specification and then, once awarded the work, performing it on a different basis. This condition ensures that an authority which subsequently abandons the specification may be subject to the Secretary of State's supervisory powers contained in Ss 13 and 14. Therefore, S7(8) emphasises the continuing importance of the specification not only during but also after the completion of the tendering process.

CONCLUSIONS

The 1988 Act establishes a fairly complex set of conditions which must be complied with in order that a local authority may

¹¹⁶ The use of these powers will be discussed below, chapter 4

perform work falling within one of the services subject to CCT. An extensive range of powers is reserved to the Secretary of State to regulate the tendering process further. However, it is interesting that the final condition set out in S7 of the 1988 Act does not relate to the tendering procedure, but requires compliance with the specification in the course of performing the work: while this is intended to prevent authorities subverting the purpose of the tendering procedure, it would not, for example, prevent alterations which are anticipated by a specification.

There are, however, a number of points where the 1988 Act diverges from the Services Directive, where the latter applies in its entirety: most notably in relation to the number of contractors who should be invited to tender, and certain time limits. However, at other times it becomes apparent that the domestic and EC regimes are not in conflict, but complement each other, in the sense that the EC regime prescribes additional requirements to the CCT regime. Thus, in relation to the preparation of specifications, the EC regime prescribes what must, or must not, be taken into account in order that the specification is as objective as possible, and does not discriminate against contractors from other Member States. Also, the Services Directive's provisions regarding the criteria for qualitative selection provide an additional, helpful layer of regulation which indicate the criteria which authorities may refer to in selecting which contractors to invite to submit tenders.

Perhaps the most important provision in the domestic legislation is the prohibition of anti-competitive practices. As a result of the powers given to the Secretary of State by S9 of the Local Government Act 1992, a considerable web of regulation now surrounds this condition, which, as we shall see, seeks not only to define what will constitute anti-competitive conduct, but which also affects several of the other conditions contained in S7. It is to this central provision which attention will now be directed.

CHAPTER 3

ANTI-COMPETITIVE PRACTICES

The starting point for any examination of the issue of anti-competitive practices is S7(7) of the Local Government Act 1988. However, while S7(7) prohibited such practices, it did not define what would constitute an anti-competitive practice: the only way of divining what would be considered an anti-competitive practice was to examine the circumstances in which the Secretary of State used his powers to issue notices under Ss 19A and 19B of the 1980 Act regarding the parallel prohibition of anti-competitive practices contained in that statute, and Ss13 and 14 of the 1988 Act¹. As the government's increasing commitment to the introduction of competition for the provision of both central and local government services became particularly evident in the early 1990s with the publication of the Citizens Charter White Paper² and of the Treasury White Paper "Competing for Quality"³, it was felt that neither the 1980 or the 1988 Act endowed the Secretary of State with sufficient powers to tackle effectively the anti-competitive practices of local authorities⁴. In order to address this perceived deficiency of the tendering procedure of the 1980 and 1988 Acts, S9 of the Local Government Act 1992 was enacted.

THE PROVISIONS OF S9 OF THE LOCAL GOVERNMENT ACT 1992

Section 9 of the Local Government Act 1992 provides machinery capable of addressing the vagueness surrounding the concept of anti-competitive conduct. Essentially, S9 grants extensive powers to the Secretary of State to issue delegated legislation prescribing conduct as being competitive or anti-competitive. The general power to issue regulations is contained in S9(1), which states:

¹ See e.g. Maclure, A Tender Process, 26/4/91 LGC 12, which examined the circumstances in which the Secretary of State had used his powers under S13 of the 1988 Act to investigate allegedly anti-competitive practices. The system of issuing notices under Ss13 and 14 of the 1988 Act will be examined in chapter 5.

² Cm 1599

³ Cm 1730

⁴ See Ibid. p25

"The Secretary of State may by regulations make provision, for the purposes of one or more of the conditions mentioned in subsection (2) below, for conduct described in the regulations to be regarded, in accordance with the regulations and in such circumstances as may be so described -

(a) as conduct which has the effect of restricting, preventing or distorting competition or is likely to have that effect; or

(b) as conduct which does not have that effect and is not likely to have that effect."

The power granted here is very broad, although it must be emphasised that the regulations issued under this section may, theoretically, seek not only to prescribe conduct as anti-competitive, but also to define what is not anti-competitive: there is always the possibility, therefore, that regulations may be promulgated with the positive purpose of establishing good tendering practice, rather than for the purpose of prohibiting certain conduct. However, it must be remembered that the power contained in S9(1) relates only to those "conditions" enumerated in S9(2).

The conditions referred to in S9(2) are the prohibition of anti-competitive practices contained in the 1980 Act, and, more relevant for the purposes of the present discussion, the prohibitions contained in Ss 4(5) and 7(7) of the 1988 Act. However, as was noted above, recent legislative developments in Scotland and Wales have rendered the works contracts regimes contained in the 1988 Act unworkable, and it is possible that a proposed revision of the legal position of inter-authority contracts will have the same effect in England⁵. Consequently, consideration of the prohibition of anti-competitive practices can be limited to that relating to functional work; namely S7(7) of the 1988 Act. Section 7(7) states that one of the conditions precedent to a local authority awarding work to its DLO is:

"....that the authority, in reaching the decision that they should carry out the work and in doing anything else (whether or not required by this part) in connection with the work before reaching the decision, did not act in a manner having the effect or intended or likely to have the effect of restricting, distorting or preventing competition."

⁵ See chapter 2, *supra*

Several things must be noted about S7(7). First, it must be emphasised that it is this provision which prohibits anti-competitive practices. Neither S9 of the 1992 Act, nor the regulations issued pursuant thereto, prohibit anti-competitive conduct: they merely seek to define what will or will not constitute it. Secondly, the prohibition is couched in curious terms: it only prohibits anti-competitive conduct where a local authority awards the work subject to CCT to its DSO, and does not apply where work is awarded to an external contractor⁶. Third, the conduct need not actually be anti-competitive, but merely intended, or likely to have that effect. Fourth, there is a temporal restriction on which conduct can be anti-competitive: local authorities can only act anti-competitively either "in reaching the decision that they should carry out the work", or "in doing anything else in connection with the work before reaching the decision". Thus a decision or action taken after the work has been awarded cannot be anti-competitive. At the other end of the scale, it is arguable that in spite of the prohibition's sweeping reference to the period "before reaching the decision", that a practice cannot be anti-competitive if it pre-dates one of the stages of the tendering process. Thus, conduct may be anti-competitive if it relates to any stage in the process from the publication of the tender notice, until the decision is taken as to who is to perform the work. However, the specification, which is prepared prior to publication of a tender notice, is also capable of falling foul of the prohibition, as its preparation is obviously one of the essential stages of the tendering process⁷, and its preparation is something which is done "in connection with the work before reaching the decision" as to who will undertake the work. It is unlikely that any action or decision which precedes the framing of the specification could be anti-competitive, however. As the preparation of a specification is effectively the first step in the tendering process, activities and decisions which are taken beforehand, and do not relate directly to it cannot be anti-competitive, because they do not form part of the competition process. The prohibitions contained in the 1988 Act thus set

⁶ See on this point the observations of Lord McCluskey in *Kershaw v City of Glasgow* DC 1992 SLT 71

⁷ See S7(2) and (3) of the 1988 Act, discussed above, chapter 2

parameters to which regulations issued under S9 of the 1992 Act must conform.

The Matters Which May Be Addressed in the Regulations

The content of the regulations which the Secretary of State may issue by virtue of S9(1) is subject to the provisions of S9(3) of the 1992 Act, which states that:

"Without prejudice to the generality of subsection (1) above or to any power conferred by section 8 of the 1988 Act (regulations with respect to fulfilment of conditions), regulations under this section may -

- (a) prescribe the matters which are to be taken into account, or disregarded, in the course of any evaluation made for the purpose of deciding who should undertake or carry out particular work;
- (b) prescribe the manner in which, or extent to which, any matter described in the regulations is to be so taken into account or disregarded;
- (c) prescribe maximum and minimum periods for the periods which are required, by virtue of paragraphs (b) and (d) of subsection (2) of section 7 of the 1988 Act, to be specified in a notice published for the purposes of subsection (1) of that section (periods for inspection of specification and for notifying an authority of a wish to tender);
- (d) prescribe a maximum and minimum period for the period which is to elapse, in a case where a notice has been so published, between-
 - (i) the announcement of the decision as to who should carry out the work in question; and
 - (ii) the beginning of the period during which the work is to be carried out;
- (e) make provision for the issue by the Secretary of State for guidance as to how conduct restricting, distorting or preventing competition is to be avoided in the doing of anything under or for the purposes of ... Part I of the 1988 Act; and
- (f) require the extent (if any) to which there has been a contravention of guidance issued by the Secretary of State under the regulations to be taken into account in any determination of whether or not a condition mentioned in subsection (2) above has been fulfilled."

The regulation-making powers given to the Secretary of State by S9(3) can be divided into broad categories. However, it should be noted that the powers listed in S9(3) are "without prejudice to the generality of" S9(1). This emphasises the importance and breadth of S9(1), and the fact that S9(3) sets out several particular instances

in which the Secretary of State may issue regulations. The various categories of regulation-making powers will now be considered in turn.

Regulations regarding evaluations as to who should perform work

The first category of regulations are those issued under S9(3)(a) and (b), which permit the Secretary of State to prescribe, first, the matters to be taken into account "in the course of any evaluation made for the purpose of deciding who should undertake or carry out particular work", and secondly, the manner and extent to which matters contained in the regulations are to be taken into account. These powers, which are very broad in their scope, and essentially relate to the stages at which tenders are invited, and at which the decision is taken as to whom will be awarded the contract to perform the work. Obviously, the invitation to tender falls within the remit of S9(3)(a) as an evaluation has to be made regarding the ability to perform the work of those who have expressed an interest. If anything, the decision as to who will carry out the work is a more obvious example of the activities which may be subject to regulations issued under these provisions, as that decision is reached after not only an evaluation of the tenderers' ability to undertake the work, but also an evaluation of the relative merits of all of the tenders which have been submitted. However, the regulations issued pursuant to S9 require local authorities to give effect to the client-contractor split⁸ during the competition process: it is arguable that the regulations effecting this are not referable to either S9(3)(a), as they do not relate to "matters which are to be taken into account", or S9(3)(b), as they do not relate to the "manner" in which a matter may be taken into account in the course of an evaluation, but instead to personnel involved in those evaluations, and is thus referable to the general regulation-making power contained in S9(1). What the Secretary of State cannot regulate, however, either by the power contained in S9(1) or those contained in S9(3) are the circumstances in which contracts are terminated: while this will involve an evaluation as to who should carry out work, it falls outwith the temporal limits set by S7(7) of

⁸ See the Local Government (Direct Service Organisations) (Competition) Regulations 1993 S.I. 848, Regulation 4. This regulation will be discussed below

the 1988 Act, which prohibits anti-competitive acts during the competition process, not acts which take place after the conclusion of the tendering procedure required by each Act.

Limitations placed upon the prospective use of the Secretary of State's powers by the Services Directive

In spite of the apparently extensive scope of the powers granted to the Secretary of State by S9(3)(a) and (b) of the 1992 Act, doubts must arise about the circumstances in which these powers can be validly exercised. In particular, one must question the extent to which it is possible for the Secretary of State to use this power to regulate validly the evaluations which local authorities undertake in the course of deciding which potential contractors may be invited to submit tenders, and in the course of evaluating the relative merits of tenders prior to awarding contracts. Both are areas which are subject to regulation by the Services Directive, and it is against its standards the parameters of the Secretary of State's powers to issue regulations must be evaluated.

With regard to evaluations made for the purposes of deciding which potential contractors should be invited to submit a tender, the provisions of the Directive which are of greatest relevance are Articles 29 to 35 of Directive 92/50, which relate to the criteria for qualitative selection of tenderers. As was noted in Chapter 2, these provisions permit contracting authorities to assess financial and professional probity, honesty, technical and economic standing and general ability to carry out the work at issue. While all of these articles, with the exception of Article 33 of Directive 92/50, are couched in permissive terms, it would appear that Articles 29 to 35 of the Services Directive are directly effective. Articles 20 and 26 of Directive 71/305, the original Works Directive⁹, were held to be directly effective in the case of *Gebroeders Beentjes v The Netherlands*¹⁰. Article 20 provided that:

"Contracts shall be awarded on the basis of the criteria laid down in Chapter 2 of this Title....after the suitability of the contractors not excluded under Article 23 has been

⁹ Now superseded by Directive 93/37

¹⁰ Case 31/87 [1988] ECR 4635, [1990] 1 CMLR 287. See paragraphs 38-44

checked by the contracting authorities in accordance with the criteria of economic and financial standing and of technical knowledge or ability referred to in Articles 25 to 28."

In considering the interaction of Articles 20, 26 and 29¹¹, and the question of whether or not they are directly effective, the ECJ opined that:

"...the rules in question provide inter alia that in checking the suitability of contractors the awarding authorities must apply criteria of economic and financial standing and technical knowledge and ability, and that [the] contract is to be awarded either solely on the basis of the lowest price or on the basis of several criteria relating to the tender. They also set out the requirements regarding publication of the criteria adopted by the awarding authorities and the references to be produced. Since no specific implementation measure is necessary for compliance with these requirements, the resulting obligations for the Member States are therefore unconditional and sufficiently precise."¹²

By extension, this reasoning is applicable to the corresponding provisions of Directive 92/50. Due to the two-tier application of Directive 92/50, there are three provisions corresponding to Article 20 of Directive 71/305. The first, Article 8, declares that:

"Contracts which have as their object services listed in Annex 1A shall be awarded in accordance with the provisions of Titles III to VI."

The second, Article 9 simply declares that services subject to Annex 1B¹³ need only conform to the rules on specifications contained in Article 14 and contract award notices contained in Article 16. As regards those services subject to Annex 1A, to which the Directive applies in its entirety, Article 10 performs exactly the same role as Article 20 of Directive 71/305, and ensures that the criteria for qualitative selection contained in Articles 29 to 35 are directly effective.

¹¹Article 29 related to the criteria for awarding a contract

¹² See *Gebroeders Beentjes BV v The Netherlands* at para 43

¹³ See chapter 1 for a discussion of the CCT services subject to Annex 1B

While there is obviously a duty on the governments of Member States to implement the Directives¹⁴, it should be remembered that that duty is not simply incumbent upon central government: a duty is imposed on all relevant national authorities to give effect to the provisions of a Directive¹⁵. Thus the fact that the Treasury has issued the Public Services Contracts Regulations 1993¹⁶ to give effect to Directive 92/50, does not fulfil the obligation to implement the Directives: the Department of the Environment, Welsh and Scottish Offices must also take steps to ensure that existing CCT legislation is amended to comply with the Directives, if necessary. Conversely, the relevant national authorities must refrain from enacting legislation which is incompatible with the Directives¹⁷. Therefore, the Secretary of State's ability to use his powers under S9 of the Local Government Act 1992 to regulate the evaluations which take place in the course of deciding whom to invite to submit tenders is severely restricted. Article 3(1) of Directive 92/50 provides that:

"In awarding public service contracts... contracting authorities shall apply procedures adapted to the provisions of this Directive." (Emphasis added)

While the Directive is addressed to the Member States for the purposes of implementation, the rights and duties contained therein are actually incumbent upon contracting authorities. As has been noted, local authorities must conform with the criteria on qualitative selection of potential contractors. The relevant provisions of the Directive, while directly effective, are couched in permissive terms, and thus grant some element of discretion to contracting authorities with regard to their use. Given the topics which are covered by these Articles, decisions as to the evaluation of potential tenderers' ability to perform work are a matter for the local authority. The Secretary of State could use his powers under S9 of the 1992 Act to require that local authorities have regard to

¹⁴ E.g. Article 44 of Directive 92/50 provides that Member States must implement the directive by 1st July 1993

¹⁵ Von Colson v Land Nordrhein-Westfalen, case 14/83, [1984] ECR 1891, [1986] 2 CMLR 430; Gebroeders Beentjes v The Netherlands at para 39

¹⁶ 1993 S.I. 3228

¹⁷ Costa v ENEL, case 6/64, [1964] ECR 585, [1964] CMLR 425

the provisions of the Directives concerning qualitative selection of tenderers, but could not prescribe the precise criteria which authorities should apply, or the weight to be given to individual criteria: those are decisions which the Directives leave to the authority¹⁸. Indeed, any attempt to prescribe which criteria must be taken into account would be incompatible with the Directives' provisions unless it related to an Annex 1B service, or to work falling below the Directive's threshold, and consequently could not survive judicial scrutiny.

Similar considerations would apply to any attempt by the Secretary of State to use his S9 powers to regulate the evaluation of tenders by local authorities. Article 36 of Directive 92/50 states that:

"(1) Without prejudice to national laws, regulations or administrative provisions on the remuneration of certain services, the criteria on which the contracting authority shall base the award of contracts may be:

(a) where the award is to be made to the most economically advantageous tender, various criteria relating to the contract: for example, quality, technical merit, aesthetic and functional characteristics, technical assistance and after-sales service, delivery date, delivery period or period of completion, price; or

(b) the lowest price only.

(2) Where the contract is to be awarded to the most economically advantageous tender, the contracting authority shall state in the contract documents or in the tender notice the award criteria which it intends to apply, where possible in descending order of importance."

Given the similarity between the terms of Article 36 and Article 29 of Directive 71/305, it may fairly be assumed that Article 36 is directly effective, and thus, given the doctrine of the supremacy of EC law, whenever there is a conflict between Community and domestic law, Community law prevails, and authorities will have a duty to give effect to it. Therefore, where Community and domestic

¹⁸ See e.g. *Gebroeders Beentjes*, op. cit. paragraphs 24-5; *CEI and others v Societe Co-operative "Association Intercommunales pour les Autoroutes des Ardennes" and others*, cases 27, 28 and 29/86, [1987] ECR 3347, [1989] 2 CMLR 224 at paras 11-18; *General Building and Maintenance Plc v Greenwich LBC* [1994] 92 LGR 21 at pp 40-42.

legislation regulate the same issue, as the former prevails it will be Community, not domestic, law which sets the parameters of acceptable behaviour, and thus prescribes the limit of discretion which public bodies enjoy. The import of Article 36 and Article 29 of Directive 71/305 is the same: the contracting authority is given the discretion to decide on what grounds a tender will be evaluated and, consequently, a contract awarded. A duty is placed on the contracting authority to choose whether it will award a contract to the tenderer submitting the lowest tender, or to the tenderer submitting the most economically advantageous tender: if the latter is chosen the authority must inform potential contractors in advance of the criteria which will be applied in evaluating tenders. Most importantly, Article 36(2) illustrates that the decision as to which criteria to use is the contracting authority's: it must notify potential contractors of the "award criteria which it intends to apply" (emphasis added). The fact that the decision as to which criteria to apply in assessing the most economically advantageous tender is one which lies within the discretion of contracting authorities was emphasised by the European Court of Justice in *Commission v Italy*¹⁹, where it was held that the contracting authority awarding the contract must "exercise its discretion on the basis of qualitative criteria that vary according to the contract in question"²⁰ rather than in accordance with a formula laid down by legislation. Thus local authorities are given the discretion by the Directives to decide which criteria to apply, as it is their judgement, and intention, which is important, not the wishes of the Secretary of State. Consequently, the Secretary of State, in principle, cannot use his powers under S9 of the 1992 Act to prescribe the criteria which local authorities must take into account in evaluating which potential contractor to award a contract to: that is impermissible as it would represent substituting the criteria which he deems important for those which the authority deems relevant, as the Directives demand. The Secretary of State is thus limited to using his powers to give authorities the option of

¹⁹ Case 274/83, [1985] ECR 1085; [1987] 1 CMLR 345. See particularly paragraph 25, discussed *infra* in relation to the Competition regulations

²⁰ *Ibid.*

using either the criteria of price alone, or most economically advantageous tender in a manner consistent with the Directive.

The Secretary of State's ability to use his power under S9 of the 1992 Act to regulate under the aegis of anti-competitive conduct the matters which may be taken into account for the purposes of any evaluation as to who should undertake work is thus much constrained by the provisions of the Services Directive. In essence, the Secretary of State may only use these powers where the proposed contract is a service presently listed in Annex 1B of Directive 92/50: as regards Annex 1A services regulations should simply state that the choice of criteria is the local authority's to be exercised in accordance with the principles established by the EC public procurement regime.

Regulations regarding time periods

The second category of regulations which the Secretary of State may issue under S9 pertains to various time periods. The first provision permitting the setting of time limits is S9(3)(c) which permits the Secretary of State to set minimum and maximum limits, firstly, for the period required by S7(2)(b) of the 1988 Act during which the specification is to be available for public inspection, and secondly, for the period required by S7(2)(d) during which potential contractors can notify authorities of their interest in tendering for a contract. These provisions are slightly peculiar, as, while all of the other paragraphs of S9(3) relate to the general prohibition of anti-competitive practices contained in the 1988 Act, S9(3)(c) relates only to two specific elements of one of the tendering conditions specified in the 1988 Act. Instead of clarifying the tendering conditions which prohibit anti-competitive conduct, regulations issued under this provision effect a substantive amendment to one of the tendering conditions contained in the 1988 Act. What limitations exist as to the exercise of the power contained in S9(3)(c)?

In relation to the power to specify minimum and maximum periods for the time during which the specification must be available for public inspection under S7(2)(b) of the 1988 Act, the

Secretary of State enjoys considerable freedom of action. The only other legislative provision which has any bearing on the exercise of his powers is the requirement set out in S9(4) that statutory instruments issued under S9 be laid before both Houses of Parliament, and are subject to the annulment procedure. There is no corresponding requirement in the Services Directive regarding the availability to the public of specifications against which this provision can be evaluated.

The position regarding the Secretary of State's power under S9(3)(c) to specify the minimum and maximum limits for the period during which potential tenderers must inform authorities of their interest in tendering is slightly more complex. The Services directive requires that potential contractors should be given at least 37 days from the date of publication of the tender notice in the Official Journal of the European Communities to notify contracting authorities of their interest in being awarded the contract²¹. Directive 92/50, however, does not attempt to set an upper limit for this stage of the tendering process. Thus, as regards services listed in Annex 1A of the Services Directive, the Secretary of State may not set a period of less than 37 days as the minimum for the notification of interest. For those services listed in Annex 1B the Secretary of State may set the minimum he deems necessary, and for all services his ability to set a maximum limit for this period is unrestrained either by any statutory limitation other than S7(4)(a)'s requirement that the subsequent invitation to tender must be issued not more than six months after publication of the tender notice, or by the provisions of Directive 92/50. However, as will be seen, the Secretary of State has set a minimum limit which is consistent with the Services directive for all services subject to CCT, although this is not necessary in all cases, and has refrained as yet from using this power to set a maximum time limit for this stage of the process²².

²¹ Directive 92/50, Article 19(1).

²² See discussion of the Local Government (Direct Services Organisations) (Competition) Regulations 1993 S.I. 848, *infra*

By virtue of S9(3)(d) the Secretary of State may also prescribe a maximum and minimum period for the time between the announcement as to who will perform the work tendered for, and the commencement of that work. It is interesting to note precisely which period is regulated: the period between the announcement of who is to carry out the work, and its commencement. As the period regulated by S9(3)(d) begins with the announcement of who is to carry out the work, it must be remembered that where a service falls within Annex 1A of Directive 92/50, there is a requirement to publish a contract award notice in the Official Journal²³. It is probable that the announcement of who will perform the work most relevant to a period prescribed under this power is the publication of the contract award notice, as, temporally speaking, this is the last element of the award procedure regulated by the Directive. Where the work involved is an Annex 1B service, the period prescribed in regulations issued under this provision will obviously run from the date on which the result of the tendering procedure is intimated to those who have submitted a tender: it should be noted that there is no publication requirement in these circumstances, so the intimation to those who have tendered for the work of their success or failure will represent the relevant announcement.

The period regulated by S9(3)(d) is of interest for another reason: it falls outwith the temporal limits of the prohibition of anti-competitive practices contained in S7(7) of the 1988 Act, which only prohibits anti-competitive conduct up to the point at which the decision is taken as to who is to carry out the work tendered for. Section 9(3)(d) relates to the period immediately after that decision is taken. However, we must remember that the various regulation-making powers contained in S9(3) to define conduct as anti-competitive are "without prejudice to the generality" of the power to regulate anti-competitive conduct contained in S9(1), which in turn states that the regulation-making powers are to be exercised for the purposes of the prohibitions on anti-competitive conduct, and thus emphasise the relevance of the temporal limitation. Therefore, it would appear that, in this specific instance, Parliament provided the Secretary of State with the power to

²³ Directive 92/50, Article 16, 17(2), Annex III E

prescribe time-limits after the conclusion of the tendering process, although it would appear that a violation of those limits may not violate the prohibition of anti-competitive practices.

Regulations permitting the issue of guidance on avoiding anti-competitive conduct

The third category of regulations which the Secretary of State may issue by virtue of S9 are those regarding the Guidance on anti-competitive conduct. Section 9(3)(e) provides that the Secretary of State may issue regulations which make provision for the issue of guidance on how to avoid anti-competitive conduct, and may simultaneously declare the extent to which contravention of the guidance may be taken into account in the course of "any determination" regarding whether an authority has acted anti-competitively²⁴. This illustrates, first, that the Guidance is not self-standing, but can only be issued pursuant to the appropriate regulations, and secondly that the Guidance may carry considerable prescriptive force. The latter is a matter of some concern because, while the regulations by virtue of which it is issued may be subject to some degree of scrutiny, and may be annulled by a vote of either House of Parliament²⁵, the Guidance itself may in effect prescribe what will constitute anti-competitive conduct without being subject to any effective scrutiny prior to its issue. Moreover, as S9(3)(f) provides that regulations may provide the extent to which contravention of the Guidance may be taken into account in the course of "any determination" as to whether an authority has acted anti-competitively: thus illustrating that contravention of the Guidance will not only be of relevance to the exercise of the Secretary of State's powers under S13 and S14 of the 1988 Act, but also to an action for breach of statutory duty brought by an aggrieved contractor²⁶. The importance of the Guidance cannot, therefore be underestimated, and after the regulations pursuant to which it is issued have been considered, the next chapter will be devoted to its consideration.

²⁴ S9(3)(f)

²⁵ S9(4)

²⁶ See Ch 5

The Local Government (Direct Services Organisations) (Competition) Regulations 1993

Having examined and evaluated the various regulations-making powers entrusted to the Secretary of State by S9 of the 1992 Act in particular, and the possible ways in which they could be used to regulate the tendering process, it now remains to consider the actual manner in which they have been used. The Local Government (Direct Services Organisations) (Competition) Regulations 1993²⁷, which came into force on 10th May 1993, regulate four aspects of the tendering process: first they set time periods relating to several stages of the tendering process; secondly they require the observance of the client/contractor split; third the regulations specify the manner in which bids are to be evaluated; finally the regulations permit the issue of guidance on anti-competitive conduct. Each of these categories of regulations will be examined in turn.

Time periods

The first thing the regulations do is to set minimum periods for the time during which potential contractors may notify local authorities of their interest in tendering for a contract, and for the period during which potential contractors can respond to an invitation to tender. The terms of the regulation in question merit closer examination, however. Regulation 2 provides that:

"(1) This regulation applies where neither the Public Works Contracts Regulations 1991 nor Council Directive 92/50/EEC relating to the co-ordination of procedures for the award of public service contracts apply to the procedures relating to the invitation to tender for the work and the award of a contract for the performance of the work to any of the contractors.

(2) The period which, by virtue of section 7(2)(d) of the 1988 Act, is required to be specified in a notice published for the purposes of subsection (1) of that section (period for giving notice of a wish to carry out work) shall be a period of not less than 37 days commencing on the date on which the notice is published.

²⁷ 1993 S.I. 848

(3) The invitation to tender for the work shall specify as the period within which contractors are allowed to respond to the invitation a period of not less than 40 days commencing on the date of the invitation."

The first point of interest is that regulation 2(1) declares that this regulation only applies in situations where the EC public procurement regime does not apply. Thus regulation 2 only sets the minimum periods where a service falls within Annex 1B of Directive 92/50. It must be emphasised, however, that regulation 2(1) does not state that the Regulations as a whole do not apply whenever the EC public procurement regime applies: only regulation 2 itself is stated not to apply in that situation. Moreover, the distinction between the two situations becomes academic, when one realises that the Secretary of State has used his power to specify periods which are almost identical to those contained in the Directive²⁸, the only differences being that no provision is made, as in the Directives, for an expedited procedure in cases where a statement regarding the authority's intended procurement requirements for the financial year has been published in the Official Journal of the European Communities²⁹, and that no provision is made for cases of urgency³⁰, although those procedures would only apply to Annex 1A services. In these circumstances the Secretary of State could have chosen to omit regulation 2(1) and simply used his powers to adopt time periods for all services which are consistent with the Directive, thus simultaneously giving effect to his duty as a "relevant authority" to implement the Directive, and avoiding the potential for confusion which regulation 2(1) represents.

The content of the other two paragraphs of regulation 2 is also worthy of note. First, it should be noted that regulation 2(2) specifies a period of 37 days as the minimum permissible for notification of interest for the purposes of S7(2)(d) of the 1988 Act. Secondly, regulation 2(3), which specifies a minimum period of 40 days for the period during which potential contractors can respond

²⁸ See Directive 92/50, Article 19(1) [notification of interest], Article 19(3) [reply to invitation to tender].

²⁹ See Directive 92/50, Article 19(4)

³⁰ See Directive 92/50, Article 20. Note, however, that cases of emergency are exempt from competition: see S2(6)

to an invitation to tender, is of some interest, as it is not issued under any of the provisions contained in S9(3), but is instead issued under the provisions of S8(2)(a) of the 1988 Act, which permit the issue of regulations which specify that:

"the contents of any invitation included prescribed matters (which may relate to the time allowed for responding, the method of responding, or otherwise)"

Regulation 2(3) is therefore quite singular in that it is the only provision contained in the Regulations which does not rely on S9 of the 1992 Act for its validity.

The next stage of the tendering process for which a time limit is set by the Regulations is the evaluation of tenders. Regulation 5(b)³¹ does not set a time limit in the same manner as the other regulations, but instead states that it will be anti-competitive for authorities to announce who will perform the work later than 90 days after the final date for submission of tenders. This regulation would appear to rely for its validity on S9(1) of the 1992 Act, as S9(3)(c) and (d) relate to different stages of the tendering process, and S9(3)(a) could only apply if the words "matters which are to be taken into account... in the course of an evaluation" are construed to mean not only the criteria which are to be taken into account, but also the expedition with which that evaluation is to be carried out: given that authorities take considerable care to determine the time allocated to each stage of the process in advance of the publication of the tender notice, however, and is consequently not a matter which is evaluated "in the course of" the tendering process. It should be noted that the length of the period during which tenders are evaluated is a matter on which the Services Directive is silent. There is some tension, however, between this time limit, and several provisions of the Guidance on anti-competitive conduct the necessary implication of which appears to be the need for a longer period for tender evaluation³².

³¹ Note that this regulation explicitly states that it only applies to functional work

³² See Chapter 4

Regulation 3, the final provision of the Regulations which specifies time limits, relies on S9(3)(d) of the 1992 Act for its authority. Regulation 3 states that:

"In a case where a notice has been published for the purposes of section 7(1) of the 1988 Act the period which is to elapse between the announcement of the decision as to who should carry out the work described in the notice and the beginning of the period during which that work is to be carried out shall be not less than 30 days, and not more than 120 days."

There are a number of points to note about this regulation. First, unlike regulation 2, in setting minimum and maximum periods regulation 3 does not attempt to distinguish between the situations where the EC Services Directive does and does not apply, probably because this time period is not addressed in the Directive. Secondly, it should be noted that, although regulation 3 specifies this particular time period, regulation 5(c) specifies that "doing anything which results, or is likely to result, in the contravention of regulation 3" will represent anti-competitive conduct. This illustrates the peculiar nature of this time period. It must be remembered that S7(7) of the 1988 Act only prohibits anti-competitive conduct up until the point at which a decision is reached which results in the DSO performing the work exposed to competition. The conduct of the authority thereafter is not affected by the prohibition. As the purpose of S9 of the 1992 Act is to permit definition of the conduct which will be anti-competitive, regulations issued under its provisions are also subject to that temporal limitation. As the cumulative effect of regulations 3 and 5(b) is to require that the work tendered for should be commenced not less than 30, nor more than 120 days, after the announcement of who is to carry out the work is effectively to define the commencement of work outside of that time period as anti-competitive, the temporal limitation contained in the general prohibition is violated, as the date of commencement of the work is by its very nature a matter which generally occurs after the decision as to who is to perform the work. It must be emphasised that the Secretary of State is entitled to use his powers under S9(3)(d) to specify the period during which work should be

commenced, as the powers contained in S9(3) are "without prejudice to the generality" of the general power contained in S9(1) to issue regulations defining conduct as anti-competitive, and that consequently the power contained in S9(3)(d) can be viewed as simply a power to specify a time limit³³. Thus, while he can specify this power by virtue of S9(3)(d), what the Secretary of State cannot do is specify that violation of that time period is anti-competitive: that violates the temporal limits of the general prohibition on anti-competitive conduct, and is ultra vires. Consequently the permissible time limits for commencement of work awarded under the 1988 Act are left without an effective statutory sanction.

The client-contractor split during the competition process

The second category to be considered is represented by the requirement contained in regulation 4 that the client and contractor roles of the local authority should be separated during the tendering process. It is interesting that regulation 4(2) provided that this separation of roles should only pertain to functional work, although, in view of the process of revision which is rendering the works contracts regimes unworkable³⁴, this is a point of purely academic interest. Regulation 4(3) essentially sets out three situations which will represent a failure to distinguish between the roles of client and contractor, and thus contravene the prohibition of anti-competitive conduct. The first is set out in S4(3)(a), which defines as anti-competitive the situation where "any individual" performs work, or is responsible for performing a "relevant operation", while concurrently being involved in the preparation of the DSO bid. It should be noted that the regulation refers to "any individual", which will mean an officer or employee of the authority, or even a consultant engaged by the authority to assist in the CCT process, and, in spite of suppositions to the contrary, a member³⁵. As the

³³ Indeed, the formulation adopted in the Regulations implicitly gives some support for this proposition: regulation 3 sets the minimum and maximum time limits, whereas it is stated elsewhere that actions in contravention of the time limits will be anti-competitive

³⁴ See chapter 2

³⁵ See Cirell/ Bennet, Regulations at last but much mystery remains, 16/4/93 LGC 10 where it is opined that because the DoE climbed down on a proposal to expressly forbid members to have client and contractor side responsibilities, regulation 4 is not capable of applying to members. This ignores the fact that, in the absence of any definition, the words "any individual" must be construed

letter sent to local authorities accompanying the Regulations works on the assumption that regulation 4 does not apply to members, it would appear that the Secretary of State's advisers have failed to appreciate the import of the regulation's wording. Thus the Secretary of State's belief that Regulation 4 cannot apply to members is a misdirection in law. The Guidance, however, does attempt to extend the client/contractor split to members, although the approach taken there is legally impermissible³⁶. However, regulation 4(3) does permit certain officers and employees of the authority to have responsibilities, or to perform work, relating to both the client and the contractor side of the tendering process. The persons to whom this paragraph of the regulation does not apply are: the head of the authority's paid service [e.g. the chief executive], or in his absence, his deputy³⁷; the statutory or non-statutory chief officer (or in his absence his deputy) who is directly accountable to the head of the paid service for the discharge of the relevant operation³⁸; and any person employed by the local authority to provide legal, financial, or "other professional advice" in relation to the business of the local authority³⁹. There are six "relevant operations" which can be carried out by these officers, but not by other officers or employees who are concurrently engaged in preparing the DSO bid. They are: selecting any publication in which a tender notice is to be published for the purposes of S7(1) of the 1988 Act; selecting those potential contractors who will be invited to submit a tender; sending tender documents to those potential contractors who are invited to submit a tender; calculating or estimating any prospective cost⁴⁰; receiving, opening or evaluating the in-house bid and the potential contractor's tenders, and; deciding whether the work is to be carried out by the DSO or by a contractor. The list is extensive, although, significantly, it does not include

in accordance with their ordinary meaning, and therefore is capable of including members. However, the real reason why members are excluded from the operation of this regulation lies in a procedural defect: see fn 35 and discussion of the Guidance.

³⁶ See discussion of paragraph 13 of the Guidance, *infra*, Ch 4, which will discuss the relevance of the Local Government and Housing Act 1989

³⁷ Regulation 4(3)(a)(i)

³⁸ Regulation 4(3)(a)(ii)

³⁹ Regulation 4(3)(a)(iii)

⁴⁰ The issue of "prospective cost" will be discussed below

preparation of the specification. There is a cogent practical reason for this omission. The specification is prepared in advance of the tender notice which marks the formal commencement of the tendering process. However, regulation 4(3) only defines conduct as being anti-competitive if it involves a person being "concurrently" involved with a "relevant operation" and the DSO bid. As the DSO bid can only be submitted after the specification is made available, it would be impossible to fulfil the requirement that the activities be performed "concurrently". It would also appear impossible for a person to be concurrently involved in preparing the DSO bid and to be involved in selecting the publications in which tender notices are to be published for the purposes of S7(1) of the 1988 Act. The issue of the notice marks the initiation of the tendering procedure, and the point in time at which the specification becomes available, and the DSO, like other tenderers, cannot submit its bid without first consulting the specification to see what exactly must be tendered for. As there is therefore a clear temporal distinction between the point at which a decision is taken as to which journals to publish the tender notice in, and the preparation of the DSO bid, it is impossible for a person to be concurrently involved in both activities. The corollary to this is that it is possible for an officer to be involved in the client side's preparation of a specification, and to transfer to the contractor side and be involved in preparation of the DSO bid.

The two remaining paragraphs of regulation 4(3) essentially provide that:

"(b) giving to the direct service organisation information about the work in addition to the information contained in the notice published under section 7(1) of the 1988 Act, without giving the same information to each of the persons who gave the local authority notice that he may wish to carry out the work;

(c) giving to the direct service organisation information about the work in addition to the information contained in the tender documents, without giving the same information to each of the contractors."

will be anti-competitive. These two paragraphs attempt to ensure that the client and contractor roles are further separated, with the

DSO placed in the same position as other potential contractors. The separation of client and contractor roles contained in these paragraphs reflects the peculiarities of the wider statutory framework. Regulation 4(3)(b) is limited effectively to the period between the publication of the tender notice and the issue of invitations to tender. Regulation 4(3)(c), however, proscribes conduct as anti-competitive in relation to the stage of the process after invitations to tender have been issued: namely the period during which tenders are being prepared. The import of the two paragraphs is essentially the same: if information is given to the DSO during either of these stages, it must also be given to potential contractors, as a failure to do so will represent anti-competitive conduct.

The Services Directive addresses the issue of giving additional information to tenderers, declaring that:

"Provided that it has been requested in good time, additional information relating to the contract documents must be supplied by the contracting authorities not later than six days before the final date fixed for receipt of tenders."⁴¹

This provision applies to "the contract documents" in general, and thus governs the supply of information relating to all contract documents from the tender notice onwards, and encompasses the specification and related documents. There is little problem with regulating the period between the issue of the tender notice and the issue of the invitation to tender which regulation 4(3)(b) governs. In relation to the period after invitations to tender have been invited, to which regulation 4(3)(c) relates, the Directive only requires that, if requested at least six days before the final date for receipt of tenders, additional information relating to the contract documents must be provided. The Directive does not state whether the information need only be supplied to the tenderer who requests it, or if all tenderers are to be given the same additional information as a result of a request. However, if we remember that the fundamental aim underlying the Directive is to provide greater transparency in public procurement procedures by the adoption of objective

⁴¹ Directive 92/50, Article 19(6)

procedural standards, then a requirement that, in reply to a request regarding the contents of the tender documents by one tenderer, all other tenderers should be supplied with the same information, would represent an objective measure providing greater transparency in the award procedure: all of the tenderers would be placed in the same position and the procedure would be rendered more transparent by virtue of the greater availability of information. However, this is not what regulation 4(3)(c) seeks to achieve: it only requires additional information to be given to other tenderers if it is provided to the DSO first. Admittedly, the reason for this lies in the fact that the Secretary of State is issuing regulations under S9 of the 1992 Act to define the circumstances in which local authorities act anti-competitively in the course of a tendering process which results in work being awarded to their DSO. However, it is inescapable that S9(4)(a) of the 1992 Act also empowers the Secretary of State "to make such incidental, consequential, transitional, or supplementary provision as [he] thinks necessary or expedient". This power could have been used to ensure that an objective and transparent procedure consistent with the Directive was established, on the grounds that such a provision would supplement the provisions of the other paragraphs of this regulation, and could be deemed necessary in order to give effect to the obligation to the duty to legislate in a manner consistent with the relevant European legislation.

The provisions of regulation 4 are described by officers as being far less severe than they might have been⁴². Indeed, the impact of regulation 4 is in some cases little felt on account of authorities voluntarily effecting a more strict division of client and contractor side responsibilities between officers⁴³. It should be remembered that the development of client and contractor roles is an inherent part of CCT, permeating not only the tendering process, but also the performance of the work after it has been awarded, and that authorities have thus been operating client- and contractor-side

⁴² Interviews with officers of Strathclyde RC, 1/12/93, 30/3/95 and with officers of Stirling DC, 19/4/93

⁴³ Interview with officers of Stirling DC 19/4/94

operations with varying degrees of success since 1988⁴⁴. Consequently it is unsurprising that authorities do not regard the requirements of regulation 4 as particularly onerous, for although the process of developing client and contractor roles is not complete in all authorities⁴⁵, authorities are by now sufficiently acquainted with the concept to have developed a body of practice which exceeds the requirements of the regulation.

The Evaluation of Tenders

The third category of regulations concerns the evaluation of tenders. Regulation 5 contains the general principle which essentially provides that a failure to assess tenders in accordance with the provisions of the Regulations will constitute anti-competitive conduct. Regulation 5(a)⁴⁶ merits closer examination. It states that:

"For the purposes of the conditions mentioned in section 9(2)(b) and section 9(2)(d) of the 1992 Act, the following conduct is to be regarded as conduct which has the effect of restricting, preventing or distorting competition, or is likely to have that effect, namely-

- (a) conduct in the course of any evaluation made for the purpose of deciding who should undertake or carry out the work, which consists of, or involves-
 - (i) calculating the amount of any prospective cost after the opening of the bid and contractors' tenders for the work;
 - (ii) giving to the direct service organisation an opportunity to explain or provide further information about the bid, without giving an equivalent opportunity to each of the contractors;

⁴⁴ For an examination of the early experiences of authorities with the client/contractor split in general see Walsh, *Competitive Tendering for Local Authority Services: Initial Experiences*, 1991, Chapters 7, 8. For a critique of the operation of the client/contractor split see, *Realising the Benefits of Competition: the Client Role for Contracted Services*, Audit Commission, Local Government Report No. 4, 1993, which advocates a strengthening of the client role, particularly by involving consumers of services in redressing several perceived problems, in order that the benefits of competition may be realised more effectively

⁴⁵ Walsh and Davis, *Competition and Service: The Impact of the Local Government Act 1988*, at 15.5

⁴⁶ Regulation 5(b) was discussed above in relation to time limits for the tendering process.

- (iii) taking into account the matters mentioned in regulation 6 in a manner, or to an extent, other than as prescribed in these Regulations;
- (iv) taking into account any costs, other than prospective costs, which the local authority would, or could, incur as a consequence of a decision to accept one of the contractors' tenders for the work"

Like regulation 4, the reference to S9(2)(b) and S9(2)(d) ensures that this regulation, and consequently the other regulations regarding tender evaluation, only apply to functional work. To understand the import of this regulation, one must first understand what is meant by "allowable" and "prospective" costs.

"Allowable" costs

The Regulations identify two "allowable" costs. The first, relating to the cost of employing disabled persons as defined in the Disabled Persons (Employment) Act 1944⁴⁷, is "the amount, if any, by which the relevant costs exceed the amount of grant aid paid, or to be paid, to the local authority by the Department of Employment in aid of the employment of disabled persons, which, if the bid were successful, would be attributable to the employment of disabled persons in relation to the work"⁴⁸. To be a "relevant cost", the cost must, firstly, be one which results from the employment of a disabled rather than an able bodied person, and secondly, be ascribed to the performance of work by disabled persons if the DSO bid is successful⁴⁹. Thus the allowable cost is simply the difference between the Department of Employment grant relating to the employment of disabled persons, and the actual cost of employing the disabled. The second allowable cost concerns the employment of trainees⁵⁰. Regulation 10(3) identifies two different sub-classes of allowable costs regarding the employment of trainees. The first sub-category defines an allowable cost as being the amount by which the "relevant costs" exceed the amount of aid given by the Secretary of State by virtue of arrangements under S2 of the Employment and Training Act 1973, or under arrangements made by

⁴⁷ Regulation 9(1)

⁴⁸ Regulation 9(2)

⁴⁹ Regulation 9(1)

⁵⁰ Trainees are defined as "persons employed under the terms of any relevant arrangements"; regulation 10(1)

Scottish Enterprise or Highlands and Islands Enterprise under S2 of the Enterprise and New Towns (Scotland) Act 1990⁵¹. The second sub-category relates to all other arrangements which local authorities make for the employment of trainees or apprentices, and states that a cost will be allowable where "relevant costs" exceed the value of the sum of the amount of any grant aid, and the costs which result from employing trainees as opposed to persons who are not trainees⁵². The "relevant costs" of employing trainees include the management of training arrangements (including recruitment, setting up projects, and placements)⁵³, all the necessary overheads of training arrangements⁵⁴, provision of instruction and the registration of qualifications⁵⁵ and the provision of financial support for trainees⁵⁶. The allowable costs in relation to the employment of trainees are thus quite extensive.

"Prospective" costs

The Regulations also refer to "prospective costs". The calculation or estimation of prospective costs is expressly stated by regulation 11 as being conduct which is not anti-competitive. This is the only instance of the Secretary of State using his power under S9(1) and S9(3)(a) of the 1992 Act to define conduct as not being anti-competitive. There are three prospective costs: redundancy costs, payments made to employees during the period of notice of dismissal where a contract is won by the private sector, and the costs of terminating contracts for hire and other contracts. Regulation 12 provides a formula for the calculation of prospective redundancy costs, which may be used where a local authority which has pursued a general policy of exercising its discretion to award compensation to eligible staff within the meaning of the relevant Regulations⁵⁷ would make staff redundant on the acceptance of a contractor's tender to perform the work. Regulation 13 permits the

⁵¹ Regulation 10(3)(a)

⁵² Regulation 10(3)(b)

⁵³ Regulation 10(2)(a)

⁵⁴ Regulation 10(2)(b)

⁵⁵ Regulation 10(2)(c)

⁵⁶ Regulation 10(2)(d)

⁵⁷ See Regulation 1 for a definition of the multitude of Regulations which must be adhered to

payment of salary and wages in lieu of notice to members of staff made redundant as a result of the DSO losing its contract to perform work to be treated as a prospective cost. Regulation 14 states that where a local authority would terminate a contract entered into for the purposes of its DSO regarding the lease or maintenance of any building or land, hire or maintenance of plant, equipment or "other things"⁵⁸, or the purchase of goods, the amount attributable to early termination of the contract will be a prospective cost. However, where a local authority decides to take into account prospective costs, it must compare them with the present value of savings⁵⁹

Conduct which will be anti-competitive during the evaluation of tenders

Regulation 5(a)(i) defines "calculating the amount of any prospective cost after the opening of the bid and the contractors' tenders for the work" as anti-competitive conduct. This provision relies for its validity on S9(3)(a) which permits the Secretary of State to prescribe "the matters which are to be taken into account, or disregarded, in the course of any evaluation made for the purpose of deciding who should undertake" work. The "matter" which is to be taken into account are the variety of prospective costs prescribed by the Regulations. The object of Regulation 5(a)(i) is procedural fairness: if a local authority was permitted to calculate prospective costs after the DSO bid and the external tenders which have been received are opened, there is the danger that it will adjust the assessment of the DSO bid accordingly once the implications of each tender for the authority's workforce and contractual obligations is known. If local authorities were allowed to calculate prospective costs after opening other tenders, questions could clearly be raised about the objectivity of the tendering process. Moreover, if the Services Directive's requirements regarding the content of tender notices, and the content of contract documents⁶⁰ are followed, this provision would appear to be consistent with the requirement that the criteria on which the most economically advantageous tender is

⁵⁸ There is no attempt to define what may be encompassed by this phrase

⁵⁹ Regulation 8(2)(b)

⁶⁰ Directive 92/50, Article 36(2)

awarded should be known in advance⁶¹. However, the flaw with this provision, is that the Secretary of State is using his powers to specify what one of the criteria to be taken into account should be, in this case the prospective costs specified in the Regulations, and the way in which that criterion should be taken into account. Article 36(2) of the Services Directive, however, requires that a "contracting authority shall state in the tender notice or in the tender notice the award criteria which it intends to apply"⁶². Quite apart from the duty placed on authorities to publicise the criteria used to assess the most economically advantageous tender, Article 36(2) also illustrates that authorities have a discretion to select those criteria: it is a matter of what the authority intends, not what the Secretary of State demands. However, the criteria selected should reflect the true cost of providing the service, and not be framed in a discriminatory manner which is solely intended to eliminate certain tenderers, or to favour a DSO. Moreover, given that Article 29 of Directive 71/305, which is basically reproduced as Article 36(2), was held by the European Court of Justice to be directly effective⁶³, it would appear that Article 36(2) is directly effective, and that in promulgating regulation 5(a)(i) the Secretary of State has enacted legislation incompatible with the Directive. This contention is further supported by *Commission v Italy*⁶⁴, where an Italian law which required contracts to be awarded to the contractor who submitted "the tender which equals the average tender or is the closest to it" was held to be incompatible with what was then Article 29 of Directive 71/305. The Court of Justice observed that:

"In order to determine the most economically advantageous tender, *the authority making the decision* must be able to exercise its discretion in taking a decision on the basis of qualitative criteria that vary according to the contract in question and cannot therefore rely on the quantitative criterion of the average price."⁶⁵

⁶¹ Directive 92/50, Article 36(2)

⁶² Directive 92/50, Article 36(2) emphasis added

⁶³ See e.g. *Gebroeders Beentjes BV v The Netherlands*, Case 31/87, [1988] ECR 4635, [1990] 1 CMLR 287, paragraphs 42-3

⁶⁴ Case 274/83, [1985] ECR 1085; [1987] 1 CMLR 345

⁶⁵ *Ibid.* para 25. Emphasis added

The criteria to be applied would therefore appear to be a matter within the discretion of the local authority where the public procurement Directives apply in their entirety, subject to the requirement that the criteria selected should be objective and non-discriminatory. Consequently the Secretary of State is unable to specify the matters which should be taken into account, or the nature of the calculations involved.

For the same reasons regulation 5(a)(iv), which defines as anti-competitive taking into account any costs which may arise from a decision to accept a contractor's bid other than prospective costs, also represents an impermissible restraint on the discretion of authorities to select award criteria given to authorities by the Directives. However, it should be remembered that, in relation to those services which fall within the ambit of Annex 1B of Directive 92/50, these regulations will remain valid.

The position on asking DSOs for further information regarding their bid

The second matter defined by regulation 5 to constitute anti-competitive conduct in the course of evaluating tenders is the situation where the DSO is given an opportunity to explain the content of its bid, without contractors being given an equivalent opportunity to explain the content of their tenders⁶⁶. This provision is obviously aimed at ensuring the procedural fairness of the tendering process, although significantly there is no corresponding duty to give the DSO or other tenderers an opportunity to elaborate on their tenders when a single tenderer is allowed to explain their bid. This failure is attributable to the fact that S7(7) of the 1988 Act only envisages the possibility of anti-competitive conduct when work is awarded to a DSO: consequently S9 of the 1992 Act is only intended to permit elaboration of the circumstances in which authorities may act anti-competitively in awarding work to their DSO. Unlike regulation 4(3)(b) and (c), regulation 5(a)(iii) relates to a matter which is not regulated by the procurement Directives.

⁶⁶ Regulation 5(a)(ii)

Comparison of tenders

The third matter defined as anti-competitive by regulation 5 is "taking into account the matters mentioned in regulation 6 in a manner, or to an extent, other than as prescribed in these Regulations"⁶⁷. To understand what is defined as anti-competitive conduct by regulation 5(a)(iii) one must first examine regulation 6, which states that:

"In the course of any evaluation made for the purpose of deciding who should undertake or carry out the work the local authority shall take into account in the manner prescribed in these Regulations-

- (a) the particulars of the bid referable to the amount which would be credited to the direct service organisation for the performance of the work, and the particulars of each contractor's tender referable to the fees and expenses which would be payable to the contractor for the performance of the work;
- (b) where the local authority requires the contractor to provide particulars of a bond or guarantee in relation to the performance of the work, the cost quoted by each contractor or (sic) providing a bond or guarantee which meets the requirements of the invitation to tender for the work;
- (c) the present value of savings;
- (d) the total amount of allowable costs included by the local authority in the bid;
- (e) the total amount of prospective costs calculated or estimated by the local authority"

The first paragraph of regulation 6 essentially requires that the relative cost of performing work via the authority's DSO and external contractors should be assessed and compared in the manner prescribed by the Regulations. As regulation 6(d) and (e) require that the amount of allowable and prospective costs relevant to a local authority DSO's bid must be calculated in a manner prescribed by the regulations, consideration of the nature of those calculations need not detain us, as the regulations concerning prospective and allowable costs were examined above. However, regulation 6(b) and (c) merit closer examination.

Regulation 6(b) provides that, where a local authority requires contractors to provide a performance bond, the cost of providing the bond must be taken into account in the manner prescribed by the

⁶⁷ Regulation 5(a)(iii)

regulations. This necessitates examination of regulation 7, which is of central importance not only to any examination the Regulation's treatment of performance bonds, but also in examining the requirements regarding the assessment of the DSO bid and contractors' tenders referred to in regulation 6(a). Regulation 7 states that:

"Having regard to the bid and each contractor's tender for the work, the local authority shall-

(a) calculate or estimate-

(i) the amount, excluding the total amount of allowable costs, which the local authority would pay to the credit of the direct service organisation, if it accepted the bid, and

(ii) the total amount of fees and expenses which the local authority would be bound to pay to the contractor if it accepted his tender;

(b) identify which, if any, of the contractors' tenders meet the following qualification, namely that the amount mentioned in sub-paragraph (a)(ii) is less than the value of the sum of-

(i) the amount mentioned in sub-paragraph (a)(i), and

(ii) the notional premium."

This regulation requires the local authority to, first, calculate the amount which would have to be paid to the DSO account, and to potential contractors, if their respective tenders were to be accepted, and secondly, to identify which contractors' tenders amount to less in value than the sum of the DSO bid and the "notional premium". The "notional premium" is most likely to be the cost of providing a performance bond⁶⁸. Thus the notional cost of providing a performance bond is added to the value of the DSO bid, and, if the total which may be paid to a contractor is less than that amount, the contractor's tender will be treated as being a "qualifying tender".

The qualifying tender

The evaluation of each "qualifying tender" is regulated by regulation 8(2), which provides that in evaluating qualifying tenders, authorities shall:

"(a) take into account the present value of savings;

⁶⁸ Regulation 1, 6(b)

(b) where the local authority decides to take into account any prospective costs, compare the present value of savings with the total amount of prospective costs."

In effect, regulation 8 establishes a two stage process of evaluation. Having assessed which contractors' tenders *prima facie* present a cheaper option than the DSO bid with the "notional premium" added on, authorities must then compare the "present value of savings" presented by the potential contractor's bid with the total amount of prospective costs which would arise from the DSO losing the work in order to determine whether awarding the work to the DSO or to an external contractor would represent the less expensive option. Regulation 6(c) requires that local authorities must evaluate the present value of savings in accordance with the provisions of the Regulations. It is provided by regulation 8(1) that the Schedule to the Regulations shall have effect for the purposes of calculating the present value of savings. The Schedule prescribes the manner in which a number of calculations which are required to be made in the course of evaluating tenders, and provides arithmetical formulae which must be adhered to⁶⁹. It regulates the calculation of the notional premium which falls to be added to the DSO bid in any one year, the assessment of the difference between the DSO's bid (from which is deducted allowable costs, and to which a proportion of the notional premium is added) and a contractor's tender in each year of the contract, the manner in which differences are to be determined in constant prices, and, perhaps most significantly, calculation of the average annual difference as a net saving, and the calculation of the present value of savings available over a ten year period.

The chain of anti-competitive practices and attendant calculations introduced via regulation 5(a)(iii) is indeed a lengthy one. Once again, however, one can question whether regulation 5(a)(iii) and the calculations prescribed by subsequent regulations and the Schedule are valid in all circumstances. The Secretary of State is not only attempting to define the method by which the relative merits of tenders should be assessed, but is also specifying

⁶⁹ On the permissibility of this see the discussion of *Commission v Italy*, Case 274/83, above fn 65

the criteria which may or may not be taken into account in evaluating those tenders. As has been noted above, where a service exposed to competition is listed in Annex 1A of the Services Directive, Article 36(2) of Directive 92/50 gives authorities the right to select the criteria which will be used to evaluate the most economically advantageous tender. Thus the legitimate application of regulation 5(a)(iii), related regulations and the Schedule is limited to those services which fall within Annex 1B of Directive 92/50.

Regulations Authorising the Issue of Guidance on Anti-Competitive Practices

The final category of regulations to be considered are those relating to the issue of guidance. Regulation 15 provides:

"(1) The Secretary of State shall issue guidance as to how conduct restricting, distorting or preventing competition is to be avoided in the doing of anything under or for the purposes of ... Part I of the 1988 Act.

(2) In any determination of whether or not the conditions mentioned in section 9(2)(b) and (d) of the 1992 Act have been fulfilled there shall be taken into account the extent of any contravention of the guidance issued under paragraph (1)."

Regulation 15(1) obviously derives its validity from S9(3)(e) of the 1992 Act, which permits the Secretary of State to make regulations which provide for the issue of guidance on anti-competitive practices. However, regulation 15(2) is the more interesting element of this regulation, and the implications of its wording should be carefully noted. First, the references to S9(2)(b) and S9(2)(d) effectively limit the scope of the guidance to functional work⁷⁰, although the effect of the revision of the legal position of inter-authority contracts upon the works contracts regimes renders this distinction of little consequence⁷¹. Secondly, regulation 15(2) represents the exercise by the Secretary of State of his power under S9(3)(f) of the 1992 Act to make provision as to the extent to which contravention of guidance may be taken into account in determining whether an authority has acted anti-competitively. In exercising this power, the Secretary of State has reserved the right to take

⁷⁰ The Guidance on anti-competitive practices re-iterates this at paragraph 2

⁷¹ See Chapter 2

"into account the extent of any contravention of the guidance", thus ensuring that the severity of any contravention of the guidance may be taken into account by the Secretary of State before he decides on the exercise of his powers of sanction under S14 of the 1988 Act⁷². Finally, the formulation adopted here raises the importance of the guidance: as the "extent of any contravention" is to be taken into account in determining whether a local authority has acted anti-competitively, the guidance must be considered whenever there is anti-competitive conduct, and, where it has been contravened, the extent of that contravention must be taken into account. The Guidance, therefore, is effectively a legislative instrument carrying considerable prescriptive force. This is what makes the Guidance so objectionable in principle: while the regulations pursuant to which it is issued are subject to Parliamentary scrutiny, the Guidance itself is free from any form of scrutiny prior to its issue.

CONCLUSIONS

The prohibition of anti-competitive practices contained in the 1988 Act is perhaps the single most important aspect of the tendering regimes established by that statute in view of the fact that the prohibition relates to the conduct of authorities at every stage of the tendering process, although the fact that the prohibition is limited to local authorities and that the statutes do not outlaw such conduct on the part of other participants in the tendering process is objectionable. Given the central importance of this prohibition it is curious that no attempt was made to attempt a legal definition of what would constitute anti-competitive conduct⁷³: consequently between the passage of the 1988 Act and the issue of the Competition regulations in 1993 the most effective means of ascertaining what would constitute such conduct was to observe the circumstances in which the Secretary of State used his powers to issue directions under S14 of the 1988 Act. With the passage of the 1992 Act the Secretary of State acquired the power to define the conduct which would violate the prohibition of anti-

⁷² See chapter 5 for a discussion of these powers.

⁷³ There was, however, some extra-statutory guidance on anti-competitive practices: see DoE Circular 1/91

competitive conduct contained in the 1988 Act. However, while the powers to specify time limits for periods in the course of the tendering process are largely unobjectionable, it would appear that the power to regulate the period between the award of the contract and the beginning of work conducted under the 1988 Act may create a time period which should be observed, but does not create one which falls within the temporal limitations of the prohibition of anti-competitive conduct, and the power to regulate the various evaluations made in the course of the tendering process may well conflict with the various discretions enjoyed by authorities under the relevant EC directive, where it applies.

The Regulations cover a wide variety of matters. Some, such as the formalisation of the client-contractor split, are relatively unobjectionable. The time-limits set for the tendering process are broadly consistent with the Services Directive, although they make no provision for cases of emergency. However, perhaps the most contentious part of the Regulations are the various provisions which specify the matters which may and may not be taken into account in evaluating tenders and deciding to whom work should be awarded. These provisions, and the related calculations may be authorised by domestic legislation, but are certainly incompatible with the EC procurement regime. Finally, the Regulations, in accordance with the power contained in S9(3)(e) of the 1992 Act, authorise the issue of guidance on anti-competitive conduct to define more specific instances of conduct which will violate the prohibition.

Having examined and evaluated the various regulation-making powers contained in S9 of the Local Government Act 1992, and the regulations issued pursuant to those powers, it now remains to examine the last element of the tendering regime, the Guidance on anti-competitive conduct.

CHAPTER 4

THE STATUTORY GUIDANCE ON ANTI-COMPETITIVE PRACTICES

The Guidance on anti-competitive conduct¹ was issued on 14th June 1993, pursuant to S9 of the Local Government Act 1992 and regulation 15 of the Local Government (Direct Services Organisations) (Competition) Regulations 1993², and replaces the earlier extra-statutory guidance³. However, the Guidance makes clear at an early stage that:

"Neither is this guidance, nor the Regulations, intended to be exhaustive. Authorities should consider all aspects of conduct, whether covered by the Regulations and this guidance or not, from the point of view of avoiding anti-competitive conduct."⁴

Two points should be noted in relation to this assertion. The first is that, while the Regulations and Guidance do not purport to be exhaustive, they are extensive: as was illustrated above⁵, the Regulations make a comprehensive attempt to regulate the timing and conduct of the tendering process, and the evaluation of tenders, whereas the Guidance addresses a wide variety of more specific topics, ranging from pre-tender questionnaires, to the duration of contracts and annual price review, to the use of assets where work is contracted out. The second thing worthy of note is that, as the Guidance and Regulations do not purport to be exhaustive, "all aspects of conduct" being relevant to the determination of whether conduct is anti-competitive, there is still a considerable degree of uncertainty regarding what conduct will violate the prohibition contained in S7(7) of the 1988 Act. Consequently, the Secretary of State's exercise of his powers under S14 of the 1988 Act will still

¹ DoE Circular 10/93, Scottish Office Environment Department Circular 13/93, Welsh Office Circular 40/93. For convenience the Guidance will be referred to by its DoE reference.

² 1993 S.I. 848

³ Paragraph 3. The earlier guidance was contained in DoE Circular 1/91, Welsh Office Circular 10/91, and Scottish Office Environment Department Circular 6/91

⁴ Paragraph 4

⁵ See Chapter 3

be of considerable importance to those wishing to ascertain what may constitute anti-competitive conduct⁶.

Irrespective of the fact that the Guidance and the Regulations are not exhaustive, the Guidance itself raises a number of issues which must now be addressed.

HOW USEFUL IS THE GUIDANCE?

In some respects the Guidance on avoidance of anti-competitive conduct is of significance not for what it says, but because of what it fails to say. While it is accepted that the Guidance is not exhaustive, some issues are, in effect, not dealt with. There are two particularly glaring omissions.

The first omission which is worthy of consideration is evidenced by paragraph 5 of the Guidance:

"When entering into a tendering process authorities should also pay due regard to their obligations under the EC Public Procurement Directives, and ensure that those obligations are met. With reference to the EC Services Directive, which comes into effect on 1 July 1993, Her Majesty's Treasury will issue separate Regulations and guidance to incorporate this into UK law."

As the EC Public Procurement Directives are now an integral part of domestic law, it would have been prudent of the Secretary of State to give some guidance to local authorities on how the Directives affected specific elements of the CCT process. Given that a failure to have regard to their obligations under the Directives may constitute anti-competitive conduct, the content of those obligations is of considerable importance, and it is therefore reasonable to give some guidance as to how the failure to take account of the Directives' provisions would give rise to a violation of S7(7) of the 1988 Act. The vague requirement contained in paragraph 5 that authorities should have regard to their obligations under the Directives is somewhat incongruous, however, in view of the fact that in many respects the framework of CCT regulation

⁶ The exercise of these powers will be discussed in chapter 5

provided by the 1988, and 1992 Acts, related delegated legislation, and, indeed, several of the provisions of the Guidance itself cannot bear scrutiny when evaluated against the provisions of the Services Directive. This would indicate that the Secretary of State has failed to appreciate his own obligations to implement the Directives, and to refrain from legislating in a manner inconsistent with their provisions.

The second major omission relates to circumstances where work is not awarded to the lowest bidder. The only paragraph of the Guidance dealing with this controversial topic is paragraph 35, which states:

"The Secretary of State believes that a decision to reject a lower bid in favour of the DSO will only in very limited circumstances be consistent with the duty of the authority to avoid anti-competitive conduct, and would expect authorities to have specific and well-founded reasons for such a decision."

This element of the "Guidance" fails to provide any guidance on the matter, although there are certain legal implications which must be considered further⁷. If anything, it is only a statement of the Secretary of State's position on this issue, indicating that when he uses his powers under S13 of the 1988 Act to seek information regarding the failure of an authority to award work to a potential contractor who submitted a lower tender, only very good reasons will deter him from exercising his S14 powers⁸. A number of questions are left unanswered by this assertion. What will constitute the "very limited circumstances" in which it is permissible to reject a lower bid in favour of the DSO's tender? Are there any circumstances in which rejection of the lower bid will always be impermissible? If the intention of the Guidance is to define the parameters of anti-competitive conduct, then this is a missed opportunity. Local authorities need some indication of the circumstances in which they can, and cannot, reject lower bids: on such a crucial matter, simply stating what the Secretary of State's

⁷ See below on the implications of this paragraph for authority's ability to select its own award criteria

⁸ The use of these powers will be considered fully in chapter 5

powers are, and what his attitude to their exercise is, will not suffice.

Having examined the matters which the Guidance fails to address, it now remains to consider the salient points of the matters which it does deal with.

THE PROVISIONS OF THE GUIDANCE: THEIR FOCUS AND LEGAL PROPRIETY

The Guidance on anti-competitive conduct runs to 70 paragraphs and tackles a wide variety of issues relating to the tendering process and the award of work. However, an examination of its provisions raises questions about the focus of certain elements of the Guidance, and, perhaps more importantly, about the legality of several provisions. The salient points of the Guidance will now be examined.

Tender questionnaires

The first provision which requires examination is paragraph 6, which states that:

"When selecting contractors to be invited to submit tenders authorities should avoid the use of unnecessarily detailed pre-tender questionnaires and should only seek information which is relevant to the work in question."

This paragraph does not attempt to define what will constitute an "unnecessarily detailed" questionnaire, it only states that authorities should avoid their use on the grounds that using unnecessarily detailed questionnaires, or seeking information which is not relevant to the work subject to the tendering exercise in question, will be anti-competitive. However, two things must be remembered when considering questionnaires issued for the purpose of selecting tenderers. First, at a practical level, one must bear in mind why the questionnaires are issued: their purpose is to ensure that invitations to tender are only issued to those who are capable of performing the work which is being exposed to competition, and to make sure that those potential contractors who have expressed an

interest in being awarded the contract, but are manifestly unsuitable, or incapable of performing the contract, are weeded out at the earliest possible opportunity. If pre-tender questionnaires are insufficiently detailed there is a possibility that contracts will be awarded to contractors who are unable to perform their contractual obligations, and that consequently the contract will have to be terminated, and a second tendering process initiated. If that occurs, the taxpayer suffers as a result of the poor quality of service, and the expense of holding a second tendering exercise. If the legislation is truly aimed at ensuring value for money for chargepayers⁹, then it is logical to have a detailed questionnaire in order to ensure that a suitable contractor is selected at the first attempt. Secondly, in determining which questionnaires are "unnecessarily detailed", or ask questions which he considers not to be relevant to the work in question, the Secretary of State does not enjoy a free hand. As was illustrated above¹⁰, the matters normally addressed in pre-tender questionnaires generally can rely for their validity on the provisions of the EC Services Directive regarding criteria for the qualitative selection of tenderers, which are directly effective. Thus, to the extent to which the Directive applies¹¹, there are a wide variety of topics, relating for example, to the probity, financial standing, and technical ability (including certain matters relating to the workforce), which an authority may quite legitimately include in a questionnaire issued for the purposes of selecting tenderers. As a corollary to this, it would be impermissible for the Secretary of State to attack questions relating to such matters as being "unnecessarily detailed" or irrelevant to the work at issue, and consequently anti-competitive, as that would represent a violation of the rights given to authorities by the Directive.

Packaging of work

The next provisions of the Guidance which must be considered are the five paragraphs relating to the packaging of contracts. Paragraph 7 states:

⁹ See Part I for an examination of this aspect of the topic

¹⁰ See chapter 2

¹¹ 1988 Act services which fall within Annex 1B of Directive 92/50 are not subject to the full application of the Directive, including the criteria on qualitative selection

"Authorities should bear in mind that existing Direct Service Organisation (DSO) or historic working practices may not be the most efficient or cost effective way of packaging a contract. It follows from the duty of authorities to avoid anti-competitive conduct that work put out to contract should be packaged in such a way as to bring it within the scope of as wide a range of contractors as practicable. For example, packaging large amounts of work over a wide geographical area may deter competition from small locally based companies."

In fairness, it would be naive to suggest that all DSO practices are scrupulously competitive and that the manner in which work is packaged by authorities always represents the most efficient solution. However, true competition is a two-way process. If both public and private sector are competing for work, the process should be fair to both. In effect, that means that while it may not be valid to assume automatically that work should be packaged in a way which gives effect to historic DSO arrangements, it is equally valid to say that to package work in a manner which is calculated to favour a section of the private sector will not automatically represent the most competitive solution. However, that is what this paragraph of the guidance would suggest to be the case. This paragraph illustrates most pointedly the fundamental flaw in the prohibition of anti-competitive conduct contained in the 1988 Acts: the assumption that conduct can only be anti-competitive if it involves favourable treatment of the DSO resulting in work being awarded to it. It is inescapable that any distortion of the competition process to favour either the public or the private sector will not represent a truly competitive solution. Why, therefore, should the whole scheme of the legislation be predicated on the supposition that a local authority can only act anti-competitively if it awards work to its DSO?

Paragraph 7 of the Guidance is at pains to point out that, as far as ground maintenance, building cleaning and jobbing maintenance are concerned "many potential contractors are likely to be small companies." In addition to this paragraph 8 deals with the situation where both large and small contractors may wish to bid for work:

"The fact that there exist large, regionally or nationally based contractors is not necessarily sufficient justification for packaging work into large contracts, as this may deter smaller companies from tendering. Where authorities believe that economies of scale may be available, they can test this belief by allowing bidders to put in separate bids for the entire contract or for individual packages within it."

The emphasis on the position of "smaller companies" is once again notable. However, paragraph 8 has several, wide ranging, practical implications. The first observation concerns the experience of one authority which had exposed work to competition on both a broad geographical basis, and, subsequently, by placing work in smaller packages, found that the private sector was equally dissatisfied with each solution: smaller contractors complained that they were prejudiced by work being exposed to competition on an authority-wide basis, while larger contractors complained when work was split into smaller packages in order to attract small companies¹². One officer of the authority in question was sceptical about the prospect of ever satisfying the private sector on this issue.

There are further ramifications of following the course set out in paragraph 8. In stating that companies should be allowed to bid for either the whole contract or parts of it there are ramifications for the way in which specifications are drafted, as they would have to recognise the severability of smaller packages from the larger whole, and for the tender evaluation process, as the relative merits of DSO bids and the tenders of the companies bidding for the whole contract, and the smaller parts of it, would have to be considered, thus making tender evaluation an increasingly complex process. Moreover, DSO bids would have to be prepared in such a way as to state the cost of carrying out each part of the work, and the work in its entirety, in order to reflect the specification, and to enable comparison with other bids. Thus the effect of paragraph 8, if its wording were to be strictly adhered to, would be to increase the costs of tender preparation and evaluation. If the costs of competition are increased then, logically speaking, there is the danger that the relative financial benefits of CCT will be reduced.

¹² Interview with officers of Stirling DC 19/4/94

The wording of the second sentence of paragraph 8, which implies that it should be left to potential tenderers to decide whether to tender for an entire contract or individual packages within it, has considerable ramifications for the preparation of tender documents. As the case of *Ettrick and Lauderdale D. C. v Secretary of State for Scotland*¹³ illustrates, it was, prior to the issue of the Guidance, permissible for local authorities to list a range of items comprising the entire contract, and to state in the tender documents that it reserved the right to accept a tender in relation to either individual items, or for the contract as a whole. A contractor which then chose to submit a tender would be deemed to have accepted these conditions and be bound by them, thus allowing the local authority to accept or reject either elements of a tender, or the entire tender, and, indeed, where the tender did not comply with the tendering conditions which it had stipulated, to refuse to accept it. However, the second sentence of paragraph 8 alters the balance: it must be remembered that the Guidance carries considerable prescriptive force and that contravention of it may be indicative of anti-competitive conduct¹⁴. As this sentence implies that it should be left to potential contractors to decide which parts of a contract to submit a tender for, the initiative now lies with tenderers: tendering conditions which stipulate the situations in which contractors may bid for different elements of a contract may contravene paragraph 8 and thus may be anti-competitive.

Packaging different descriptions of work in one specification

The third element of the treatment of packaging work which must be considered is that of the packaging of different descriptions of work in a single specification. Two paragraphs of the Guidance are of considerable importance to consideration of this issue. The first is paragraph 9, which indicates that:

"Where separate defined activities are combined in a single contract (such as refuse collection and "other cleaning"), tenderers should be given the option to bid for each type of work separately where this may secure a better competitive response and result in better value for money. The considerations that might lead an authority to rely on ...

¹³ 1995 SLT 996

¹⁴ Local Government Act 1992 S9(3)(f); Local Government(Direct Service Organisations) (Competition) Regulations 1993 S.I. 848, Regulation 15(2)

Section 2(7) of the 1988 Act ought to be balanced against its duty to avoid anti-competitive conduct."

This paragraph represents an attempt by the Secretary of State to place constraints on the exercise of two distinct discretionary powers given to local authorities by defining certain aspects of their exercise as anti-competitive conduct.

The first sentence of paragraph 9, in providing that, where different defined activities are combined in one contract, contractors should be allowed to submit bids for each particular activity raises some problems. The first point to note is that this represents a violation of the discretion given to authorities by Article 24(1) of Directive 92/50:

"Where the criterion for the award of the contract is that of the most economically advantageous tender, contracting authorities may take account of the variants which are submitted by a tenderer and meet the minimum specifications required by such contracting authorities. The contracting authorities shall state in the contract documents the minimum specifications to be respected by the variants and any specific requirements for their presentation. They shall indicate in the contract notice if variants are not authorised" (Emphasis added)

Article 24(1) thus permits authorities either to set a minimum specification which tenderers must comply with, or to preclude the possibility of a variation on the specification being accepted, provided that the authority in question has indicated its intention in the tender notice. Thus, as regards Annex 1A services, authorities enjoy some discretion regarding packaging of work, as the import of this Article is dependent on the content of the specification, and to decide the extent to which tenders which are variants on the specification will be accepted. Therefore, if the specification combines two defined activities under the 1988 Act, and the contract notice precludes the possibility of tenders which are variations on the specification, a local authority may validly reject tenders which pertain to one part of the work only. The content of paragraph 9 thus represents an attempt by the Secretary of State to legislate in a manner inconsistent with Directive 92/50 by defining conduct as being anti-competitive for the purposes of S7(7) of the

1988 Act. The position regarding those services which fall into Annex 1B of the Directive is obviously different, as Article 24 (1) does not apply in those circumstances. However, given the nature of the 1988 Act services which fall into Annex 1B, it is relatively easy to dispose of this issue. Where services such as schools and welfare, and "other catering" are concerned it is likely that the combination of these two similar services would draw objections from contractors. As regards other services, it is unlikely that, for example legal services would be packaged with construction and property services: the only other services which could realistically be packaged together are refuse collection and "other cleaning", given that it encompasses street cleaning.

The second point to note about the first sentence of paragraph 9 concerns the latitude given to local authorities by the 1988 Act regarding the packaging of work. Section 2(5) of the 1988 Act states that:

"Where work would (apart from this subsection) fall within more than one defined activity it shall be treated as falling only within such one of them as the authority carrying out the work decide."

The discretion given here is very wide and, subject of course to the constraints of reasonableness and improper purpose, it is difficult to see how it can be limited. Certainly if the general prohibition of anti-competitive conduct is to be equated with the prohibition on the use of powers for improper purposes, then circumstances may arise from an authority's use of this power which would justify a finding of anti-competitive conduct, and the issue of a S14 notice. However, one must bear in mind that, while the discretion contained in S2(5) is wide, but reasonably well-defined, the concept of anti-competitive conduct is one which is, in spite of the delegated legislation issued under S9 of the 1992 Act, fairly vague, and, because of S9 of the 1992 Act, one which is subject to redefinition by the Secretary of State. While S7(7) imposes a duty to avoid anti-competitive conduct, it is not a concrete one. Consequently if, as is evident here, the Secretary of State wishes to limit the effect of a statutory discretion, Parliamentary approval should be sought for

doing so: what is in effect an amendment of a statute should not be effected by a redefinition of what will constitute anti-competitive conduct.

The second half of paragraph 9 asserts that an authority should balance the exercise of its power under S2(7) of the 1988 Act against its duty to avoid anti-competitive conduct. Section 2(7) of the 1988 Act states:

"If a defined authority carry out work which (apart from this subsection) would not fall within a defined activity, and which in their opinion cannot be carried out efficiently separately from a particular defined activity, the work shall (if they so decide) be treated as falling within that defined activity."

This subsection gives considerable discretion regarding the packaging of work. While the judgement involved in the exercise of the discretion is clearly a subjective one as to what is or is not efficient, this does not absolve authorities from the constraints of unreasonableness and improper purpose, which would prevent attempts at absurd packaging of contracts. However, one must question the efficacy of paragraph 9. The purpose of S2(7) is to permit authorities to subject work to the CCT process in circumstances where they are not required to do so, in order to maximise the efficiency of service provision. Can a local authority be acting anti-competitively when it is seeking to expose more work to the rigours of competition than it is legally required to? A determination that a local authority was acting anti-competitively in those circumstances would require careful explanation of its logical basis in order that not only its legal propriety, but also its compatibility with the present administration's policy of subjecting as many of the activities of government as possible to competition, could be appreciated.

The Guidance's treatment of packaging continues in paragraph 10, which states that:

"Authorities should avoid packaging which brings together unrelated areas of work into a single contract, or includes specialist areas of work in a single contract, if such

packaging is likely to restrict competition by deterring contractors working only in one of the fields or specialist activities concerned."

This paragraph can be viewed as an extension of the principle contained in paragraphs 7 and 8 that work should be packaged in order to make it attractive to as wide a range of contractors as possible. The reference to packaging unrelated areas of work in a single contract also indicates that this paragraph is an extension of the position stated in paragraph 9 regarding authorities' powers to include work which would not otherwise be subject to CCT in the tendering process. However, the example given in paragraph 10 that specialist activities such as management of golf courses should not be packaged with similar general activities such as management of sport and leisure facilities, is revealing. Here the Secretary of State is seeking to address services which are related. However, by suggesting that it may be anti-competitive to package specialist services with those of a more general nature, even though both fall within the same defined activity, the Secretary of State is seeking to ensure that local authorities will split the work falling within defined activities into a number of constituent contracts. This marks a severe restriction of the discretion authorities enjoy to package contracts as they wish which also would result in the tendering process becoming more bureaucratic.

Reference to the EC public procurement regime in packaging work

The final provision of the Guidance relating to the packaging of work is paragraph 11. This directs that, in packaging work, authorities should have regard to the duties imposed on them by the EC Public Procurement Directives. Once again there is no indication as to what the import of the directives is. The duty to have regard to the Directives is somewhat incongruous given the Secretary of State's failure to do so. Indeed, the final lines of paragraph 11 are the cause of some concern on this issue. The suggestion that authorities "may wish to seek the advice of the relevant trade associations and the local Chamber of Commerce or other expert advice on the most appropriate form of packaging", may itself represent a breach of the EC public procurement regimes¹⁵. If an

¹⁵ See Cirell/Bennet, CCT: Law and Practice, 16.31

authority were to restrict itself to consulting the local Chamber of Commerce and UK trade associations, it is possible that taking into account those views alone may result in the contract being packaged in a manner which would favour UK suppliers and thus represent a restriction on the free movement of services, in violation of Articles 59 and 62 of the EEC Treaty. In addition, as regards all services falling within Directive 92/50's remit, such a pattern of consultation may violate Article 3(2), which declares that:

"Contracting authorities shall ensure that there is no discrimination between different service providers."

To take the extreme position, if a local authority consulted with and implemented the advice of the Chamber of Commerce in its locality alone, the resulting packaging of work may favour service providers in that locality. Consequently suppliers not only from other Member States, but also from other parts of the United Kingdom, would experience discrimination. It is thus safer to avoid consultation with those in the locality, and UK trade associations, in order to avoid the suggestion that the EC's prohibitions of discrimination are being violated by the manner in which work is packaged.

Contract duration

While the paragraphs of the Guidance relating to the packaging of contracts indicate a desire on the Secretary of State's part to alter the balance of the competitive process in a way more favourable to smaller private sector companies in particular, they are not the only provisions capable of having that effect. In relation to the duration of contracts, paragraph 12 declares:

"Within the framework established by the Regulations, authorities should have in mind the appropriate length of contracts For example, a contract with a short duration might not allow contractors sufficient scope to amortise their setting-up costs"

The second sentence raises a fundamental question: who is compulsory competitive tendering intended to benefit? The classic argument for competitive tendering has traditionally been that the test of the market results in financial savings which can be passed

on to chargepayers¹⁶. The emphasis has always been on the pursuit of value for money for the benefit of chargepayers, not DSOs or contractors. Applying the test of whether or not value for money is obtained for chargepayers, it would not matter how frequently the work had to be retendered, as long as the benefits of doing so are passed on to them. Therefore, the fact that contractors incur costs in setting up contracts is irrelevant: if the rhetoric is to be believed, CCT is intended to be for the benefit of chargepayers, not service providers. It may be trite to argue that contracts of short duration will deter potential bidders, but that misses the point: if the test of the market is an objective one and affects all bidders equally, the most effective solution should, theoretically, be found.

There are also legal objections to the content of paragraph 12. It must be remembered that, as regards tendering exercises conducted under the 1988 Act, authorities retain a discretion to award contracts for a period which conforms to the minimum and maximum limits set by the relevant delegated legislation¹⁷: contracts which conform to the maxima and minima set in those regulations will *prima facie* be competitive and consistent with the policy and purposes of the 1988 Act.

The client-contractor split

The next paragraph of the Guidance to be considered relates to the client-contractor split. As was discussed above, regulation 4 of the Local Government (Direct Service Organisations) (Competition) Regulations 1993¹⁸ provided a legal basis for the client/contractor split in the course of the competition process. In spite of suggestions to the contrary¹⁹, the wording of regulation 4 appears capable of encompassing the activities of elected members as well

¹⁶ This matter is discussed in Part I. See also e.g. 1983 Conservative Party Manifesto, p36.

¹⁷ See e.g. the Local Government Act 1988 (Defined Activities) (Specified Periods) (England) Regulations 1988 S.I. 1373; Local Government Act 1988 (Specified Periods) (Scotland) Order 1988 S.I. 1414. See Chapter 2 for a discussion.

¹⁸ 1993 S.I. 848

¹⁹ See e.g. Cirell/Bennett, Regulations at last but much mystery remains, 16/4/93 LGC 10

as the officers and employees of authorities²⁰. Paragraph 13 of the Guidance relates specifically to the position of members with regard to the client/contractor split. It declares that:

"Councillors should ensure that their responsibilities as members of the Council as a whole override any specific responsibility they may hold for supervising, monitoring, or overseeing the activities of a DSO. Elected, or co-opted, members of an authority with responsibility for the preparation of a DSO bid should always ensure that, when serving on committees or sub-committees dealing with the relevant operations set out in Regulation 4(3) of the Regulations, they follow the principles set out in the National Code of Local Government Conduct in carrying out those duties. Whilst involvement in overseeing the activities of a DSO is not strictly a 'private or personal interest' in terms of the Code, members should treat any such involvement as if it were and disclose it, or if they think appropriate, withdraw from committee discussion of tender matters."

The first problem with paragraph 13 is that regulation 4(3) does not prescribe the "relevant operations" for the purpose of regulation 4. Instead, regulation 4(3) defines the conduct which is proscribed, for example, giving the DSO information extraneous to that contained in the tender documents without giving the same information to other tenderers²¹. The "relevant operations" referred to in the Guidance are those matters defined in regulation 4(1) which are not to be carried out by individuals holding client- and contractor-side responsibilities concurrently. It therefore appears that the Secretary of State has misdirected himself in law as to the content of the Regulations, and thus rendered this paragraph of the Guidance absurd, meaningless and inapplicable.

The second major problem with paragraph 13 is that it seeks to declare that certain conduct should be treated as being tantamount to a contravention of the National Code of Local Government conduct. It must be remembered that the National Code is now issued pursuant to S31 of the Local Government and Housing Act 1989, which empowers the Secretary of State to issue²² or revise a

²⁰ See the discussion of regulation 4 above for an explanation of the reasoning underlying this proposition.

²¹ The precise import of Regulation 4 is considered above, chapter 3, in the course of the examination of the Competition Regulations.

²² S31(1)

code²³. However, before issuing, revising or withdrawing a code, the Secretary of State must consult with the appropriate representatives of local government²⁴. In addition S31(5) of the Local Government and Housing Act 1989 provides that the Secretary of State must lay revisions before both Houses of Parliament for 40 days and are subject to a negative procedure. As paragraph 13 seeks to extend the effect of the National Code in order that certain conduct may be treated as anti-competitive, it is tantamount to being a substantive revision of the National Code. However, in order to be valid, a revision must be issued subsequent to consultation, and to being laid before each House for 40 days without being annulled. Neither of these conditions has been fulfilled. Therefore paragraph 13 cannot be a valid revision of the Code due to severe procedural improprieties²⁵. At best, paragraph 13 represents a statement of good practice, but an attempt to introduce a client-contractor split at member level by this means is legally incompetent by virtue of its failure to follow the procedure set out in the 1989 Act.

While one can attack paragraph 13 on the grounds of a misdirection in law, and of a procedural impropriety, one can also question the need for this provision. It must be remembered that the instance occurring in this paragraph is not the only occasion on which the Secretary of State has misdirected himself in law as to the ambit of regulation 4 of the Competition Regulations: since their issue, the Secretary of State and others have contended that regulation 4 does not apply to members, although this contention cannot be supported by a construction of the regulation. Consequently, as regulation 4 does apply to members, paragraph 13 is not only ultra vires, but has always been unnecessary.

Time periods

The next issue addressed by the Guidance is the timing of the stages of the tendering process. Paragraph 14 simply restates that the Competition Regulation's provisions regarding the timing of the

²³ S31(2)

²⁴ S31(3)

²⁵ See *Lord Diplock, Council for Civil Service Unions v Minister for the Civil Service* [1985] AC 374

tendering process do not apply where the EC Public Procurement Directives apply. However, the other two paragraphs relating to this issue merit further consideration. Paragraph 15 states that:

"Minimum or maximum periods of time are not intended to be adopted mechanistically. Authorities should in each case give consideration to, and adopt periods of time for, the various stages of tendering, within the minimum and any maximum periods prescribed, which are appropriate for the tender and type of work in question. The Secretary of State will expect authorities to give reasons for the timetable they have adopted for a tender, if required to do so."

It is difficult to see how the conduct of an authority which ostensibly falls within the parameters of paragraph 15 could be anti-competitive. While local authorities are under a duty not to do anything anti-competitive, by virtue of S7(7) of the 1988 Act, both the system of regulation put in place by this statutes and the relevant EC Directive give authorities considerable discretion in relation to determining the timing for each stage of the tendering process. Thus, for example, both the Competition Regulations²⁶ and the Services Directive²⁷ set a minimum period for receipt of tenders after an invitation has been issued of 40 days, but do not set a maximum time limit.

Two issues arise as a direct result of the discretion given to authorities by the UK legislation in particular. The first relates to the manner in which the discretion is exercised, and the circumstances in which an over-rigid policy results in a decision being ultra vires. The classic statement of principle on this issue is that of Lord Reid in *British Oxygen Co. Ltd v Minister of Technology* ²⁸, where he commented:

"There are two general grounds on which the exercise of an unqualified discretion can be attacked. It must not be exercised in bad faith, and it must not be so unreasonably exercised as to show that there cannot have been any real or genuine exercise of the discretion. But, apart from that, if the Minister thinks that policy or good

²⁶ 1993 S.I. 848 regulation 4(3)

²⁷ Directive 92/50, Article 19(3)

²⁸ [1971] AC 610

administration requires the operation of some limiting rule, I find nothing to stop him..."

Thus it was held permissible to adopt a rigid policy as long as the public body taking the decision was still prepared to consider the possibility of departing from the policy where circumstances required²⁹. Consequently, so long as an authority has displayed a propensity to consider the adoption of different time periods its actions cannot be characterised as being an abnegation of the discretion entrusted to it. However, the implication of this paragraph of the Guidance is that, even if a discretion is exercised in accordance with the established principles of administrative law and the parameters of the statutory framework, the Secretary of State may seek to impugn it by defining its exercise as anti-competitive.

Secondly, and very much related to the first point, is that one must always bear in mind the context and purpose of the discretion entrusted to authorities³⁰. The various discretions granted to local authorities to determine the length of each stage of the tendering process must be viewed in their context as an integral part of the tendering process. Each of the periods set out in the legislative scheme is there for one reason: everything beyond the minimum and maximum periods is automatically assumed not to represent the most competitive solution, whereas conduct within those limits is. This is nowhere more obvious than in tendering procedures conducted under the 1988 Act, where the various time limits are actually the constituent elements of several of the conditions which must be fulfilled before a local authority can undertake work through its DSO³¹. Consequently if conduct falls within those limits it is consistent with the policy and purposes of the Act; namely ensuring that authorities carry out work "only if they can do so competitively". If the parameters set in the statutory scheme were capable of being anti-competitive, different ones would have been

²⁹ See also on this point *Elder v Ross and Cromarty District Licensing Board* 1990 SLT 307 per Lord Weir at pp 311J-312A

³⁰ See *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997

³¹ See Ch. 2

set. Therefore, if the periods used by authorities in each tendering exercise are within the bounds set by domestic or, more importantly, EC legislation, they are *prima facie* valid and competitive. It is impermissible for the Secretary of State to attack the decision of an authority as anti-competitive where that conduct lies within the limitations of what has been statutorily indicated to be competitive conduct. To accept otherwise would be tantamount to accepting that ostensibly *intra vires* acts could be successfully challenged, something at variance with the binding authorities³². Indeed, for the Secretary of State to suggest that an authority would be acting anti-competitively in such circumstances would itself be a negation of the purposes of the legislation³³, as it would imply that the statutory scheme, and the discretion given to authorities by it, does not represent a competitive solution. Moreover, one must appreciate the legal position of the Guidance relative to other components of the statutory scheme. The Guidance is issued pursuant to the powers contained in S9 of the 1992 Act for the purpose of defining what will constitute anti-competitive conduct: it is sub-delegated legislation which cannot effect a substantive amendment to the 1988 Act, but only define such conduct as will violate the prohibition contained in S7(7). Consequently, its provisions must be consistent with the policy and purposes of the 1988 Act, and in any conflict between the two, it is what Parliament has prescribed to be competitive in the 1988 Act which will prevail. However, it must be admitted that if an authority used its discretion in a manner which was manifestly unreasonable, or for an improper purpose, that would be an abuse of discretion which resulted in the negation of the purposes of the legislation, and consequently be anti-competitive.

Where services fall within Annex 1A of the Services Directive, the timing of the periods during which potential contractors can notify authorities of their interest³⁴, and during which those invited to

³² See e.g. *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147

³³ On the need to construe delegated legislation in accordance with the policy and purposes of the statutory framework within which it operates see e.g. *Hotel and Catering Industry Training Board v Automobile Proprietary Ltd* [1969] 1 W.L.R. 697; *In re Toohey; ex parte Northern Land Council* (1981) 38 A.L.R. 439

³⁴ Directive 92/50, Article 19(1)

submit tenders can do so³⁵, are identical. Thus, where local authorities are under a duty to comply with the procurement Directive, it will force upon authorities a measure of the conformity in the timing of the stages of the tendering process which the Secretary of State seeks to impose by this paragraph of the Guidance.

Contract documentation

The paragraphs of the guidance relating to contract documentation appear to be quite uncontroversial³⁶, being limited to a restatement of authorities' duty to make available the specification³⁷, emphasising the role of the specification in defining the work to be performed³⁸, and the standard of performance³⁹. However, one can take issue with paragraph 20:

"The authority should be prepared to consider proposals from contractors for providing the service which involves a different method of operation from that of the DSO. However, the Secretary of State accepts that, for some services, it may be necessary to specify the nature of the work in terms of the process to be followed or the type of professional or technical input which a contractor would be expected to offer, provided such requirements are set out in general terms."

We must remember that local authorities enjoy a discretion by virtue of the Services Directive to preclude variations on the specification, or to set a minimum specification which must be respected by those tenderers who wish to submit variations on the specification⁴⁰. Therefore, where the Directive applies, a finding of anti-competitive conduct based on a failure to consider contractors' proposed variations in accordance with paragraph 20 would be invalid, as it would represent an attempt to negate the discretion given to authorities by the Directive.

³⁵ Directive 92/50, Article 19(3), (4)

³⁶ See, however, Cirrel/Bennett, CCT: Law and Practice, 16.36-37

³⁷ Paragraph 17

³⁸ Paragraph 18

³⁹ Paragraph 19

⁴⁰ Directive 92/50, Article 24(1)

Contractual requirements

The next salient point of the Guidance is the treatment of contract requirements contained in paragraphs 23 to 25. Paragraph 23 states that:

"The contract, which sets down the binding obligations of the parties, should not impose unduly or unreasonably onerous conditions on the successful tenderer. An authority will be properly concerned to ensure that the contract binds the contractor to provide the service or carry out works as specified. However, authorities should bear in mind that unduly or unreasonably onerous contract requirements may deter potential competitors."

Paragraph 24 continues to say that, where possible, authorities should use standard form contracts recognised in the trade or profession subject to the tendering exercise, while paragraph 25 states that any default system should apply equally to DSOs and private contractors.

To the extent that specifications are a draft form of the contract, requiring only the contract price and the name of the contractor be filled in to transform it into a contract, the Secretary of State can regulate the proposed contractual obligations under his power to define conduct as anti-competitive. However, one must bear in mind that these paragraphs refer to contractual terms. For the contract for performance of work to be concluded the name of the contractor and value of the contract must be known. These two essential items can only be known once the tendering procedure has been concluded. Therefore the Secretary of State cannot attack the actual terms of a concluded contract as anti-competitive, as this would be a violation of the temporal restriction contained in the prohibitions of anti-competitive conduct. He may define a condition proposed in the course of the tendering process as anti-competitive, but in those circumstances where the contracts are prepared separate from the specification, and especially where they are prepared after the decision has been taken as to who should perform the work, any attempt by the Secretary of State to define contractual conditions as anti-competitive is clearly impermissible.

Invitations to tender

The next issue to be considered is the Guidance's treatment of the issue of invitations to tender. The first provision to be considered is paragraph 52:

"Authorities need not necessarily restrict the number of contractors invited to tender to the minimum required under ... Section 7 of the 1988 Act, where more have expressed interest. These provisions do not prescribe a level of competition at which an authority may assume that it has fulfilled the conditions in ... Section 7(7) of the 1988 Act. Rather, they prescribe only minimum levels of competition and, in order to avoid anti-competitive conduct, authorities should not exclude contractors solely on the basis of adhering to these minima."

The Guidance then proceeds to indicate, in paragraph 53, that the number of contractors who should be invited to submit tenders should be between four and six, if the authority is to be considered to be acting in a manner which is not anti-competitive. These are perhaps the most objectionable paragraphs of the Guidance, as they evidence considerable disregard of the provisions of both domestic and EC legislation.

As a matter of domestic law, one must remember that S7(4)(b) and(c) of the 1988 Act requires authorities to invite at least three potential contractors to submit tenders. This limit has been set by Parliament as an integral part of the statutory scheme. Parliament considered that an authority which invited at least three potential contractors to submit tenders would be acting competitively and in accordance with the minimum standard of competition prescribed by statute. The attempt of the Secretary of State to suggest that a local authority following the scheme of competition prescribed by Parliament may be acting anti-competitively is clearly *ultra vires* and noxious to the established constitutional principles regarding the relationship between the legislature and executive. The reprehensible nature of the Secretary of State's action in issuing this paragraph is compounded by the fact that Parliament endowed him with the power to alter the number of potential contractors invited to tender⁴¹, but, instead of using this power to alter the

⁴¹ S7(5) of the 1988 Act

statutory scheme in accordance with Parliament's wishes, he has chosen a course which effectively calls into question the competence of Parliament's view of what will constitute a minimum acceptable standard of competition.

The Secretary of State's definition of what will be anti-competitive conduct also fails to have sufficient regard to the provisions of the Directive. The Services Directive requires that where a contract is to be awarded by restricted procedure, authorities should indicate in the contract notice the range of potential contractors which they intend to invite to tender, which range must be at least five and at most twenty, depending on the nature of the work to be performed, and the number of tenders invited must be sufficient to ensure genuine competition⁴². The 1988 Act does not give effect to this requirement, and the Secretary of State has clearly failed to use the power given to him by S7(5), which allows him to specify that a number of potential contractors other than three must be invited to submit a tender, to amend the statutes in a manner which would make them consistent with the Directives. Moreover, the approach taken by the Guidance is inconsistent with the Directive. Firstly, the Secretary of State attempts here to specify the permissible range of tenderers, whereas the Directive sees this as a matter of the contracting authority's discretion, provided that it acts within the parameters set out in Article 27(2) of the Services Directive. Secondly, the range of contractors who must be invited to submit a tender prescribed here by the Secretary of State is too narrow: the lower limit of four tenderers prescribed in paragraph 53 falls below the minimum indicated in the Directives, while the maximum which the Secretary of State considers competitive, six, falls far short of the maximum prescribed by the Directives, twenty. Moreover, it would appear that the Guidance does not represent one of "the most appropriate forms and methods to ensure the proper functioning of the directives"⁴³ as, in spite of the prescriptive force which it carries, the fact that it is sub-delegated legislation, and subject to

⁴² Directive 92/50, Article 27(2)

⁴³ Royer, Case 48/75, [1976] ECR 497 at p 518

arbitrary change by the Secretary of State, means that it does not accord with the principle that:

"each Member State should implement...directives...in a way which fully meets the requirements of clarity and certainty in legal situations which directives seek...Mere administrative practices, which by their nature can be changed as and when the authorities please and which are not publicised widely enough cannot in these circumstances be regarded as proper fulfilment of the obligation imposed by Article 189 [of the EEC Treaty] on Member States to which the directives are addressed"⁴⁴

Therefore, the Secretary of State could not attempt to implement the Directives' provisions by means of amending the Guidance.

The situation which authorities are thus presented with is one where the Secretary of State has attempted to imply incompetently that adherence to the provisions of domestic legislation may be anti-competitive, in circumstances where neither the domestic legislation nor the Guidance which casts aspersions upon it will survive scrutiny against the standards set by the relevant Directive, which the Secretary of State has also failed to implement. Given this confused state of affairs, authorities must rely on the relevant provisions of the Services Directive, which are sufficiently clear, precise and unconditional to be directly effective⁴⁵. However, if the Secretary of State were, for example to determine that a local authority had acted anti-competitively by inviting only three or four tenderers and thus failing to have regard to the provisions of the EC procurement regime in accordance with the duty contained in paragraph 5⁴⁶ of the Guidance, authorities would have a valid defence, as the Secretary of State would be attempting to rely on a Directive which he had failed to properly implement. This would be a violation of the Community law principle of *venire contra factum proprium*⁴⁷.

⁴⁴ Commission v Belgium, Case 102/79, [1980] ECR 1473 at 1483. See further on this point Toth, *The Oxford Encyclopædia of European Community Law*, Volume 1 pp 177-9

⁴⁵ See on this point *Fratelli Costanzo Spa v Comune di Milano* [1989] ECR 1839, [1990] 3 CMLR 239 at paras 30-1

⁴⁶ See above

⁴⁷ See e.g. *Unil-it*, Case 30/75, [1975] ECR 1419 at p 1428

The issue of invitations to tender to inexperienced contractors

The remaining paragraph of the Guidance's treatment of the circumstances in which invitations to tender should be extended is paragraph 54, which states that:

"Neither should authorities exclude contractors from bidding solely on the grounds that they have no experience of providing municipal services or carrying out public works in the United Kingdom. Prior to the introduction of CCT there was little private sector provision of some of the services concerned, but companies have demonstrated that they can respond to the opportunities and undertake new services successfully."

The Secretary of State is correct in stating that it is impermissible for authorities to withhold invitations from contractors who have never provided services or performed works for local authorities in the United Kingdom: where a company is established in a Member State of the European Union that would amount to a violation of Article 59 of the EEC Treaty's prohibition of restrictions on the free movement of services at the very least. However, Article 32(1) of the Services Directive provides stating that the ability of service providers may be evaluated "with regard to their skills, efficiency, experience and reliability", with Article 32(2)(b) permitting authorities to establish a service provider's level of technical ability by requiring evidence of the services which it has provided in the preceding three years, along with details of the value of those services, the period during which they were supplied, and whether the services have been supplied to the public or private sector. In addition, evidence of performance may be sought from those to whom services have been supplied. The contents of the Services Directive represents an objective minimum standard for the assessment of the technical ability of potential contractors, and as has been noted, these provisions are directly effective⁴⁸. The Secretary of State therefore cannot seek to place undue restrictions on the ability of authorities to examine the technical ability of potential contractors, and must appreciate that as a matter of European law, the level of technical ability which will be acceptable

⁴⁸ See *Gebroeders Beentjes BV v The Netherlands*, Case 31/87, [1988] ECR 4635, discussed in chapter 3.

is for contracting authorities to determine⁴⁹. Consequently, authorities are acting within their powers in refusing to extend an invitation to those potential contractors who have no experience of performing work of the kind which is the subject of the tendering exercise, subject to the limitation that an undertaking which has no experience of performing work itself may not be excluded from participation in the tendering procedure if it can show that it can acquire the necessary skills from other agencies, or subsidiaries⁵⁰.

References as to a contractor's experience

As an extension to the paragraphs regarding the invitation to tender, the Secretary of State states in paragraph 55 that where references are sought from other authorities, contractors should be informed from whom the references are sought, and "should ensure the additional choice of referees is such as to ensure a fair and balanced view of the work of the contractor." As no attempt is made to define what will constitute a "fair and balanced view", it is difficult to see what is meant by this vague phrase. Indeed, it is reprehensible that authorities may theoretically be penalised for contravention of such a vague definition of anti-competitive conduct. Where the Services Directive applies it is obvious that the references will, in effect, relate to all relevant work carried out in the preceding three years⁵¹. Thus a realistic picture of the contractor's ability will be presented. It is equally obvious that, in situations where the Directive applies, potential contractors should be aware before notifying authorities of their interest in being awarded a contract that references may be sought from those public authorities for which they have performed work. In such circumstances, it is clearly superfluous to inform potential contractors of a matter of which they should already be aware.

⁴⁹ Ibid. at paragraph 17. For a fuller discussion of this issue see chapter 3

⁵⁰ See *Ballast Nedam Groep NV v Belgische Staat*, Case C-389/92, 14/4/94

⁵¹ Article 32(2)(b). It is interesting to note that this provision permits a potential tenderer to be asked which services were provided to the public sector: in this case certificates relating to the work should be issued by the relevant contracting authority. What, however, happens where performance has been unsatisfactory?

Tender evaluation: treatment of redundancies

The next matter contained in the Guidance which merits consideration is contained in the paragraphs relating to tender evaluation. It is curious that paragraphs 46 to 51 are almost exclusively concerned with the circumstances in which redundancy costs are to be taken into account. Paragraph 46 declares:

"The Regulations allow authorities to take into account, for the purposes of tender evaluation, certain redundancy costs for those who would otherwise continue to be employed by the DSO if it were successful. Authorities should not, however, take redundancy costs into account as a matter of course, but should make a case by case assessment of whether it would be appropriate to do so."

Several legal issues arise from this particular paragraph. First, the Secretary of State is of the view that authorities should not automatically take redundancy costs into account in evaluating tenders. The Local Government (Direct Service Organisations) (Competition) Regulations 1993 give local authorities the discretion to take redundancy costs into account as a prospective cost⁵², although, when taken into account such costs must be calculated in accordance with the provisions of the Regulations⁵³. Like any discretion, an authority may validly adhere to a policy regarding its exercise, provided that they admit the possibility that a situation may arise justifying departure from it⁵⁴. Indeed, regulation 12 of the Competition Regulations 1993 requires that the authorities who avail themselves of this discretion should already follow a policy of exercising their discretion to use certain statutory redundancy schemes, and paragraph 48 of the Guidance itself makes further allusion to the redundancy policies pursued by local authorities. In view of this situation, paragraph 46 of the Guidance creates unnecessary confusion.

While the Competition Regulations 1993 clearly state that it is not anti-competitive to take prospective costs such as redundancies

⁵² 1993 S.I. 848, regulations 8(2), 12

⁵³ Regulations 5,6,7,8,12

⁵⁴ See e.g. *British Oxygen Company v Minister of Technology* [1971] AC 610

into account⁵⁵, the Guidance implies that an authority should not avail itself of the discretion to take redundancy costs into account too freely, or this may constitute anti-competitive conduct. This is an absurd situation, the relevant delegated legislation giving authorities the power to do something which will not be anti-competitive, and the sub-delegated legislation stating that in certain circumstances the exercise of that discretion will be anti-competitive. This inconsistency of approach is more reprehensible in view of the close proximity in the issue of the Regulations and the Guidance: five weeks separated each event. However, if the Secretary of State were to rely on this element of paragraph 46 and determine that an authority acted anti-competitively in applying its general policy and taking into account redundancy costs apparently as a matter of course, a local authority could rely on regulations 8, 11 and 12 and contend that the Secretary of State, in attempting to constrain its discretion to take into account redundancy costs, had misdirected himself in law as to the precise import of the Regulations, given that they specify that taking into account redundancy costs is not anti-competitive. Finally, it is interesting that the Secretary of State has sought to use the Guidance in an attempt to constrain authorities' discretion to take into account redundancy costs in the course of tender evaluation, but has ignored the cost of paying employees money in lieu of notice.

Tender evaluation: other issues

The remaining paragraphs relating to evaluation of tenders are fairly mundane in their content: paragraph 47 states that the number of redundancies assumed should be referable to the work concerned, and costs should be calculated on the employment characteristics of each employee made redundant in accordance with the council's redundancy policy; paragraph 48 states that where support staff will be made redundant, the redundancies must be referable to the loss of the work; paragraph 49 states that authorities should be able to give the Secretary of State an account of their redundancy policy and the basis on which redundancies are made, and paragraph 51 states that where the DSO's employee's representatives are allowed to make representations about proposals, the employees of

⁵⁵ See regulation 11

other tenderers should be given an equal opportunity to make representations. Paragraph 50 states:

"Authorities should inform contractors when inviting tenders if they intend, where appropriate, to take account of any extraneous cost items in evaluating tenders, and of the cost items to be taken into account, although they need not inform them of the magnitude of these costs."

To an extent this provision is superfluous. Where the Services Directive applies, and authorities award contracts on the basis of the most economically advantageous tender, authorities must inform potential contractors of the constituent criteria both in the contract notice⁵⁶, and the contract documents⁵⁷. This paragraph can therefore be viewed as extending this requirement to other situations, although it also means that the Secretary of State will be able to monitor, via the complaints of potential tenderers, the extraneous costs used by authorities which do not accord with the requirements of the Competition Regulations.

Rejecting lower tenders

Apart from addressing the issue of which costs may be taken into account in the course of tender evaluation the Guidance also attempts to prescribe the basis on which work should be awarded. Paragraph 35 states that a decision to reject a lower tender in favour of the DSO bid will only be consistent with the duty to avoid anti-competitive conduct in "very limited" (though undefined) circumstances, and that the Secretary of State would expect "specific and well-founded reasons" to be produced for such a decision. Once again this provision appears to be at variance with the discretion given to authorities by Article 36 of Directive 92/50, where applicable, to select the criteria in accordance with which the most economically advantageous tender will be selected. It is implicit in the award of contracts on the basis of the most economically advantageous tender that the contracting authority may always reject an ostensibly lower bid in favour of a higher one,

⁵⁶ Directive 92/50, Articles 15(2), 17(1), 36(2), Annex 3

⁵⁷ Directive 92/50, Article 36(2)

it being for the contracting authority, not the Secretary of State, to establish the relative importance of price as one of the criteria⁵⁸.

If, however, the Secretary of State seeks to contend that he is seeking to provide that local authorities should not award contracts on the basis of the most economically advantageous tender, but instead solely on the basis of the lowest price, one must admit that he may do so when the Directive does not apply. However, where the Directive does apply, two objections to this suggestion may be put forward. First, the Directive gives authorities the discretion to choose whether to use either the criteria of the most economically advantageous tender, or lowest price: it is their decision alone, and the Secretary of State may not determine which they should use. Secondly, the approach taken in paragraph 35 comes perilously close to infringing the provisions of the Services Directive regarding the exclusion of abnormally low tenders⁵⁹. Contracting authorities may reject tenders which appear to them to be abnormally low⁶⁰, but before doing so must give the tenderer in question the opportunity to explain the elements of the tender which appear to be low, and to take that explanation into account before reaching its decision. However, this paragraph of the Guidance, while it may contain the saving provision that authorities may explain their conduct to the Secretary of State, also may be used by the Secretary of State to justify the determination that a local authority had acted anti-competitively in rejecting a tender which appeared to it to be abnormally low. However, the decision to reject an apparently abnormally low bid is clearly a decision for the authority, not the Secretary of State. To suggest otherwise would be tantamount to a material departure from the provisions of the directives, and impermissible.

⁵⁸ Ibid.

⁵⁹ See Article 37

⁶⁰ See on this point *Fratelli Costanzo Spa v Comune di Milano*, Case 103/88, [1989] ECR 1839, [1990] 3 CMLR 239 at paras 25-7; *Impresa Dona Alfonso di Dona Alfonso & Figli S.N.C. v Consorto per lo Sviluppo Industriale del Comune di Monafalcone*, Case 295/89 at para 18.

Transfer of undertakings

The penultimate aspect of the tendering process addressed by the Guidance which will be considered here is its treatment of the transfer of undertakings. In principle the Acquired Rights Directive⁶¹, which protects the employment rights of those employees transferring from one economic entity to another, is capable of applying where a service is contracted out⁶². However, the United Kingdom has been reluctant to accept this⁶³, and in spite of a general readjustment of Her Majesty's Government's position⁶⁴, the Department of the Environment has been particularly reluctant to admit that TUPE applies in principle to CCT exercises, as is evidenced by the Guidance's provisions regarding this issue.

The six paragraphs of the Guidance relating to TUPE outline in abstract terms the effect of the Transfer of Undertakings (Protection of Employment) Regulations 1981⁶⁵, stating that the Secretary of State's view is that it is an essential part of the competitive process that authorities should not preclude consideration of any option for service delivery by placing prior restrictions on the arrangements proposed by contractors⁶⁶. Consequently the Secretary of State is of the view that, in essence, if authorities seek to require that successful contractors must act in accordance with the obligations of the TUPE Regulations regarding the transfer of staff, they would be acting anti-competitively⁶⁷. However, paragraph 43 states that:

"The Secretary of State accepts that authorities may wish to refer prospective contractors to the TUPE Regulations. In doing so, however, they should refer to the Regulations in neutral terms, and should not express a view on the likelihood of the Regulations applying or otherwise, lest this may have the effect of distorting, restricting or preventing competition."

⁶¹ Directive 77/187

⁶² See e.g. *Rask v ISS Kantineservice A/S*, Case C-209/81, [1993] IRLR 133. The principles relating to transfer of undertakings will be discussed at length in relation to the non commercial considerations regime; see Ch 6

⁶³ See e.g. *Lyell rejects ruling on EC jobs law*, FT 22/1/93

⁶⁴ See e.g. HC Debs Vol 224, Cols 359-60w re the Home Office's position.

⁶⁵ Paragraph 40

⁶⁶ Paragraph 41

⁶⁷ Paragraph 42

Paragraph 44 leaves prospective contractors the opportunity to submit tenders on the basis of a transfer of undertakings existing if they considered that the Regulations apply, and requires local authorities to provide such information as a tenderer may require to do so, a requirement which may place a DSO at a disadvantage, particularly where the tenderer subsequently changes his mind as to the applicability of TUPE⁶⁸, while paragraph 45 states that the Secretary of State considers that it would be inappropriate, and thus anti-competitive, for an authority to take into account redundancy costs where a contractor submits a tender on the basis that TUPE applies, an approach which may conflict with the Competition Regulations. The tone of the Guidance is clearly hostile to the application of TUPE.

In view of the general dissatisfaction with the Guidance's treatment of TUPE, an "issues paper" was issued by the DoE in January 1994 containing proposed amendments to the paragraphs of the Guidance relating to TUPE⁶⁹. However, while this document may propose various amendments to the Guidance, and may be a more accurate statement of what the Government's position on the application of TUPE is, it must be emphasised that it is only an issues paper: it did not effect a substantive amendment of the Guidance, and has no prescriptive force. Consequently, the paragraphs of the Guidance regarding TUPE are still effective, although the more accurate statement of the Secretary of State's position for the purposes of determining that an authority has acted anti-competitively for the purposes of invoking his powers under and S13 and 14 of the 1988 Act may well be the "issues paper". It should be borne in mind that the prohibition of anti-competitive conduct contained in the 1988 Act is so broad that it is possible for the Secretary of State to determine that conduct which has not been defined as such by virtue of the exercise of his powers contained in S9 of the 1992 Act will violate the prohibition. The situation regarding the Secretary of State's position on the application of

⁶⁸ See Arrowsmith, *Developments in Compulsory Competitive Tendering* (1994) 3 P.P.L.R. CS153 at p170 for a discussion of the ways in which paragraph 44 places DSOs at a competitive disadvantage

⁶⁹ Issues Paper: Handling of CCT Matters in Relation to TUPE, DoE 1994

TUPE, however, offends against the principle of legal certainty: authorities and potential contractors are faced with the choice of acting in accordance with the provisions of the Guidance, which have statutory force, and are widely known, or acting in accordance with the "Issues Paper", which is perhaps not as widely available and has no statutory force, as it contains a series of proposed amendments.

Central to the "Issues Paper's" proposals for the revision of the Guidance's provisions on TUPE is a revised paragraph 43:

"The Secretary of State accepts that authorities may wish to refer prospective contractors to TUPE when inviting tenders. Whether the regulations apply in any particular case will depend on the nature of the work involved and the contractor's detailed proposals for carrying it out. Authorities should therefore not prejudge whether or not the regulations apply.

"They may, however, wish to indicate their preliminary view of the likelihood of the regulations applying. In doing so they must make clear that the applicability of the regulations depends ultimately on a consideration of any proposals submitted by a contractor and that contractors may put forward proposals with different TUPE implications. Otherwise, authorities' expressions of view may have the effect of distorting, restricting or preventing competition. Any preliminary view must be adopted in good faith and based on careful consideration of the activity in question"

Basically this paragraph states that it is permissible for authorities to state that they feel that *prima facie* TUPE may apply, but that they must simultaneously admit the possibility that, on examination of contractor's proposals, it may subsequently appear that TUPE does not apply. Consequently, contractors must be allowed to put forward proposals with a variety of TUPE implications: the submission of TUPE and non-TUPE bids by contractors may significantly extend the tender evaluation period⁷⁰. In addition, it is proposed that authorities may seek an indemnity against costs which may arise from the discovery that an evaluation that a contract was not subject to TUPE had been erroneous, and that the Competition Regulations 1993 would be amended in order that indemnities

⁷⁰ See Latimer, *The Chester Report*, 2-8 December 1994 MJ 27, where it is estimated that the submission of TUPE and non-TUPE bids could extend the tender evaluation period by at least three weeks

offered by local authorities may be an allowable cost. The proposed changes also intend to require that successful tenderers should offer comparable pension arrangements where there is a transfer of undertakings. The proposed alterations have satisfied neither potential contractors nor local authorities, and have been criticised as "riddled with inconsistencies which may expose local authorities to legal risk"⁷¹.

The Secretary of State's position on this matter is clearly aimed at precluding as far as possible local authorities from pointing out that TUPE probably applies to transfers which would take work from local authorities to the private sector, whose preferred method of winning contracts and maintaining profits is to reduce the pay and conditions of employees. The Secretary of State consequently fears that the mere prospect of TUPE applying will dissuade potential contractors who wish to win contracts by undercutting wage rates. However, in failing to countenance the possibility that authorities can express any more than the vaguest view that TUPE may apply, the Secretary of State is acting in contravention of the provisions of Article 28 of the Services Directive, which provides:

"(1) The contracting authority may state in the contract documents, or be obliged by a Member State to do so, the authority or authorities from which a tenderer may obtain the appropriate information on the obligations relating to the employment protection provisions and the working conditions which are in force in the Member State, region or locality in which the services are to be performed and which shall be applicable to the services are to be performed and which shall be applicable to the services provided on site during the performance of the contract.

(2) The contracting authority which supplies the information referred to in paragraph 1 shall request the tenderers or those participating in the contract award procedure to indicate that they have taken account, when drawing up their tender, of the obligations relating to employment protection provisions and the working conditions which are in force where the service is to be carried out. This shall be without prejudice to the application of the provisions ... concerning the examination of abnormally low tenders."

These provisions merit some consideration. It is clear that Her Majesty's Government would rather not have authorities refer

⁷¹ Maclure, Guide still seeking TUPE trail, 28/1/94 LGC 8

potential contractors to information regarding employment protection legislation, as is evident from the terms of the Guidance, so authorities are forced to rely on the discretion which they are given to refer potential contractors on their own initiative to "the authority or authorities from which a tenderer may obtain the appropriate information relating to" employment protection provisions. The appropriate national authority is probably the Department of Employment, which could inform a tenderer of which employment protection legislation is currently in force. However, the first paragraph refers to the employment protection provisions "which are in force in the Member State, region or locality", thus opening the possibility that the authority itself may inform potential contractors of the relevant legislation in its "locality" if another authority refuses to do so. Moreover, authorities, having informed potential contractors of where to obtain information on the relevant legislation, are then under a duty to request tenderers to indicate that they have taken account of the obligations relating to employment protection, and significantly, "the working conditions which are in force in the place where the service is to be carried out"⁷², in preparing their tenders. Presumably, the corollary to this is that tenderers who refuse to do so may be excluded from participation: certainly it would appear that where tenderers fail to take into account employment protection legislation or local working conditions the provisions of the Directive relating to the treatment of tenders which appear to be abnormally low may be invoked⁷³. However, what is clear is that, where the Directives apply, local authorities which direct potential contractors to a competent source of information on the applicability of employment protection legislation will actually be under a duty to request tenderers to take account of all relevant employment protection legislation in preparing their tenders. As TUPE is obviously an employment protection provision, authorities are therefore under a duty to request tenderers to submit bids which take account of TUPE. The Secretary of State's position is inconsistent with this, and

⁷² Article 28(2)

⁷³ Ibid. See also Arrowsmith, *Developments in Compulsory Competitive Tendering* (1994) 3 P.P.L.R. CS153 at p172

cannot, therefore bear legal scrutiny, where the Service Directive applies in its entirety.

Treatment of assets

The final issue contained in the Guidance which will be considered here is the treatment of assets. The general principle is contained in paragraph 56:

"Assets are in some cases an important input to the operation of a service- for example refuse vehicles or works depots. The Secretary of State considers that authorities may be in breach of their duty to avoid restriction, distortion or prevention of competition if they refuse to make key premises or other assets available to external contractors in the event of being successful in competition. Making available assets will ensure that contractors who would not be in a position to compete for work without such facilities are not excluded from competition."

Consequently, the Secretary of State considers that where contracts are to run for a year or more, depot space should be made available to contractors⁷⁴; that the possibility of redeveloping a depot if the DSO does not win is not a valid reason for refusing access, and that authorities should make clear when inviting tenders the terms, condition and period during which depot facilities and vehicles will be available to contractors⁷⁵, which terms are not to be onerous compared to the terms imposed on DSOs⁷⁶. In view of the approach taken in these paragraphs, the content of paragraph 57 appears rather incongruous:

"It is for authorities to decide in the circumstances of each case the assets which it would be appropriate to make available in order to facilitate a good show of competition (subject of course to conditions in leasing agreements which prohibit such novation)"

The confusion is compounded by paragraph 61 which states that it is "not normally appropriate for an authority to *require* contractors to take on particular premises or other assets, and thereby to rule out bids involving alternative arrangements". In addition, the Secretary

⁷⁴ paragraph 58

⁷⁵ Paragraphs 59, 60

⁷⁶ Paragraph 62

of State, explains that in evaluating tenders, authorities are to take account of the benefits of an asset which has been released by the DSO's failure to win a contract⁷⁷, the credit given to those tenders where the asset is not required being based on the open market disposal of an asset⁷⁸, with the net costs of cancelling leases being a permissible prospective cost⁷⁹, although, where an asset will be disposed of for a sum less than the authority paid for it, the sum which will be received must be taken as a benefit, rather than the difference between the original and resale value being calculated as a loss, for tender evaluation purposes⁸⁰. However, as has been noted above⁸¹, where Directive 92/50 applies in its entirety, and authorities choose to award contracts on the basis of the most economically advantageous tender, they, not the Secretary of State, enjoy a discretion to select the criteria for tender evaluation and may thus theoretically frame the criteria in such a way as to take into account the actual losses incurred on disposal of assets.

It would therefore appear that almost any conduct, from not offering assets to the contractors who may win work, through failing to make clear the basis on which assets are made available, to requiring that contractors should take over assets, may be anti-competitive. This section of the Guidance therefore appears not to define what will be anti-competitive, but instead to raise the possibility that virtually any course of conduct available to an authority may be anti-competitive in the circumstances.

The treatment of assets, however, is an issue which straddles the temporal watershed between what can and cannot be defined as anti-competitive by the Secretary of State, as, while he may regulate the basis on which many issues which relate to the basis on which assets are, or are not, made available, he cannot proscribe the actions of local authorities which occur after a decision has been taken as to who should perform the work. In this respect, one must consider paragraph 66:

⁷⁷ Paragraph 63

⁷⁸ Paragraph 64

⁷⁹ Paragraph 69

⁸⁰ Paragraph 68

⁸¹ Chapter 3

"In the event of the DSO being unsuccessful in tendering for a contract involving the use of certain assets, and the successful contractor not requiring them, authorities have expressed the view that it is in their interests to retain those assets to facilitate future rounds of competition. It is for individual authorities to decide whether they wish to retain unwanted assets. However, the Secretary of State considers that the charge, or credit, for that asset should reflect the full value of assets, unencumbered by restrictions imposed by an authority's wish to retain them for further use. To do otherwise may restrict, distort or prevent competition by discouraging contractors who may be able to offer better value for money by using cheaper capital assets."

The conduct addressed here can only occur after a decision has been taken as to who will perform the work which has been tendered for: only then will an authority know that it has an asset which it does not require, and which a successful external contractor does not need in order to perform the work. In view of that fact, the Secretary of State has acted *ultra vires* in defining the conduct described in paragraph 66 as anti-competitive, as the prohibition of anti-competitive conduct contained in S7(7) only proscribes conduct up until the point at which a decision is taken as to who is to perform the work.

A WORD ON WHITE-COLLAR GUIDANCE

With the advent of CCT for white-collar services the Government intend to issue guidance for white-collar services. This is another aspect of the topic which reorganisation has an impact upon: there is obviously less urgency to promulgate guidance for white-collar CCT in Scotland, where white-collar contracts need not be entered into until 1998, than in English Metropolitan Districts, where contracts must be issued during 1996. The approach taken, however, has been quite confusing. Draft guidance on CCT for legal and housing management was first issued on 10 June 1994. The legal status of this document, which was not in circular form, was undeniable: even if it had been intended to, it could have no prescriptive legal force due to the fact that it was issued before either housing management or legal services had been added to the list of defined activities

contained in S2 of the 1988 Act⁸². However, in December 1994, after all of the services concerned had been added to the list of defined activities, a document entitled *Guidance on the avoidance of anti-competitive behaviour: legal, construction and property and housing management services* was issued by the DoE. The pronouncements contained in this document appear so authoritative, that at least one commentator was convinced that this document performs an equivalent role to Circular 10/93⁸³. However, this is not, and cannot be, the case. First, when asked, the DoE will admit that this document is not the definitive guidance on this issue, but only a draft, although it will simultaneously be pointed out that local authorities will be expected to comply with its provisions⁸⁴. Secondly, quite apart from the DoE's admission, this document does not fulfil the role of the statutory guidance authorised by S9(3)(e) of the Local Government Act 1992. Section 9(3)(e) permits regulations to "make provision for the issue by the Secretary of State" of guidance on the avoidance of anti-competitive practices, while regulation 15(1) of the Local Government (Direct Service Organisations) (Competition) Regulations 1993⁸⁵ states that the "Secretary of State shall issue guidance". There is, however, nothing in this document to indicate that it has been issued by the Secretary of State, or enjoys official sanction: whereas both Circular 10/93, and the earlier, extra-statutory, Circular 1/91, were published for the DoE, Scottish, and Welsh Offices by HMSO, and bore the signatures of ministers or under-secretaries, this document bears no crest or signature to indicate its origin. Nor, like its predecessor, does it appear in the list of government publications. The only indication in the document that it may have emanated from a government department is that the final paragraph states where enquiries should be directed to. What, however, is the legal import of this document?

⁸² Housing management became a defined activity on 23rd June 1994 by virtue of the Local Government Act 1988 (Competition) (Defined Activities) (Housing Management) Order 1994 S.I. 1671; legal services was added to the list on 10th November 1994 by the Local Government Act 1988 (Competition) (Defined Activities) Order 1994 S.I. 2884

⁸³ Dobson, Battling through the moral maze, 24/3/95 LGC 18

⁸⁴ Telephone conversation with civil servants of DoE Division G3, 6/7/95

⁸⁵ 1993 S.I. 848

The "guidance" on white-collar CCT certainly cannot be statutory guidance as described in S9(3)(e) of the 1992 Act, or in the regulations issued pursuant to it. It therefore does not equate to the role which Circular 10/93 fulfils. Whereas Circular 10/93 is statutory guidance, and the extent to which there is a contravention thereof may be taken into account in determining whether an authority has acted anti-competitively, the "guidance" issued in December 1994, given that it lacks statutory authority, cannot be relied on in making such a determination. As it is, in effect, extra-statutory guidance, a contravention of it could not have the same effect as contravention of Circular 10/93. However, while contravention of this extra-statutory guidance may not have the clearly defined and understood effect as contravention of one of the provisions of Circular 10/93, it does not mean that an authority will not be acting anti-competitively if it does one of the things prohibited in the extra-statutory "guidance". The reason for this proposition is quite simple: neither the regulations nor the Guidance issued pursuant to S9 of the 1992 Act is intended to define exhaustively what will constitute anti-competitive conduct. Thus an authority may fail to fulfil the duty contained in S7(7) of the 1988 Act to avoid anti-competitive conduct even though it has done something which has not actually been defined as anti-competitive in regulations or Guidance, and may be subject to sanction by the Secretary of State using his S13 and S14 powers, or to an action for breach of statutory duty. The difference is that the statutory Guidance not only defines matters which are anti-competitive, but by virtue of the 1992 Act, also carries considerable prescriptive force, as contravention of it will be *prima facie* anti-competitive, whereas the extra-statutory nature of the guidance on white-collar CCT issued so far means that it may define matters which appear to be anti-competitive, but lacks the prescriptive force of the statutory Guidance.

This, however, may be of little consequence except in two situations, given that the Secretary of State would still be able to allege in a S13 notice and a S14 direction that it appeared to him that the conduct some aspect of a white-collar tendering exercise had been anti-competitive, although he would have to explain more

fully why he thought so rather than identifying a paragraph of the white-collar "guidance" which it appeared to him had been contravened. The two situations in which the extra-statutory nature of the white-collar guidance may cause difficulties are fairly obvious. First, difficulties may arise if there is a divergence between the statutory and extra-statutory guidance. In such a situation, if the Secretary of State issued a S13 notice alleging that, contrary to the white-collar guidance, an authority had acted anti-competitively, but the course taken by the authority had been permitted by the statutory guidance, then the authority would have the advantage of the Secretary of State: the statutory Guidance, with its prescriptive force, must necessarily prevail over the extra-statutory guidance, thus providing the defence of statutory authority. However, it is unlikely that such a situation would arise, given that both the statutory and extra-statutory guidance both represent the model of competition which the Secretary of State wishes to pursue. The second situation where a difficulty may arise is where an aggrieved contractor raises an action for breach of statutory duty against a local authority on the ground that it has acted anti-competitively: it must be remembered that contravention of guidance issued pursuant to S9 of the 1992 Act may be taken into account in the course of making "any determination" concerning whether a local authority has acted anti-competitively⁸⁶, thus ensuring that contravention of statutory guidance would be prima facie anti-competitive for the purposes of such an action. Where extra-statutory guidance is concerned, it would carry no prescriptive value before a court, thus forcing the aggrieved contractor to illustrate precisely why the actions of an authority had been anti-competitive.

CONCLUSIONS

A substantial web of regulation has grown up around the ill-defined prohibition of anti-competitive conduct contained in 7(7) of the 1988 Act. The purpose of all subsequent legislative measures, which invariably derive their authority from S9 of the Local Government Act 1992, has been to attempt to define the

⁸⁶ 1992 Act, S9(3)(f); 1993 S.I. 848, regulation 15(2)

circumstances in which authorities will and will not be acting anti-competitively. However, the attempts of the Local Government (Direct Service Organisations) (Competition) Regulations 1993, and particularly the Guidance on anti-competitive conduct issued pursuant to those regulations, often do not bear close legal scrutiny. A wide variety of the issues addressed by the Guidance, particularly in relation to tender evaluation, violate the provisions of the EC Services Directive in the circumstances in which it applies in its entirety. Moreover, the Guidance can be represented as an invidious instrument of regulation which, at various times and in relation to various issues, manages to violate the provisions of Directive 92/50, important constitutional principle, the domestic statutes from which it derives its authority, and even the regulations pursuant to which it is issued. In such circumstances, the inference which one is forced to draw is that the Secretary of State has chosen to pursue his preferred model of competition without due regard for the legal constraints within he must operate.

The Guidance reveals much about the model of competition which the Secretary of State wishes to pursue. The insistence that authorities should not reject a lower tender without good reason, the attempt to restrict the application of TUPE, which would adversely affect the ability of tenderers to undercut DSOs by forcing them to offer the same working conditions, as far as possible, and the attempt made to restrict the ability of local authorities to take into account redundancy payments in the course of tender evaluation illustrate that the Secretary of State sees the essential criteria for the award of a contract as being the price. He wishes to see the lowest bid succeed and in doing so he will attempt to restrict the ability of authorities to take into account factors which they may otherwise legitimately consider. However, these are not the only provisions which attempt to ease the path of private sector tenderers seeking to win CCT contracts: the paragraphs relating to packaging of contracts, for example, also appear to be intended to have that effect. This apparent willingness of the Secretary of State to assist private sector contractors by defining certain conduct as anti-competitive may well be at variance with the wider purposes of the statutory scheme:

"The purpose of the Act is not, as I understand it, primarily to secure to contractors opportunities of bidding for and obtaining contracts for the performing of functional work for local authorities. The purpose is rather to secure that local authorities will only undertake such activities ... if they can do so competitively ..."87

The purpose of S9(3)(e) and (f) of the 1992 Act is to facilitate the definition of the conduct which will contravene the prohibition of anti-competitive conduct set out S7(7) of the 1988 Act. The particular purpose of those prohibitions is to ensure that local authorities do not act anti-competitively: to ensure that local authorities do not favour their DSO to the prejudice of other tenderers, not actively to assist private sector tenderers. Yet certain provisions of the Guidance appear more concerned with assisting the private sector than restricting authorities' ability to act anti-competitively.

⁸⁷ *R v Secretary of State for the Environment ex parte Knowsley*, 31/7/91(unreported) per Ralph Gibson LJ

CHAPTER 5:
PROCEDURES FOR REDRESS OF BREACH OF THE 1988 ACT'S
PROVISIONS

Having examined the mechanics of the tendering process, it now remains to consider the procedures which exist for seeking redress of a failure to comply with the 1988 Act's provisions. Chief amongst these are the powers given to the Secretary of State by S13 and S14 of the Local government Act 1988. The powers given to the Secretary of State by these provisions do not relate to the competition process alone: as will be seen, these powers may be used to sanction local authorities for their DSOs' inadequate performance of their obligations regarding the work awarded following a tendering process. However, this is but one avenue of redress and some attention must also be paid to the remedies available to aggrieved tenderers seeking redress for a breach of the tendering procedures

THE CIRCUMSTANCES IN WHICH THE SECRETARY OF STATE
CAN EXERCISE HIS POWERS UNDER THE 1988 ACT

The procedures which may ultimately lead to a sanction being imposed upon an authority by the Secretary of State may only be used in the circumstances recounted in S13 of the 1988 Act. Section 13(1) states that:

"If it appears to the Secretary of State that in the financial year beginning in 1989 or in a subsequent financial year a defined authority-

- (a) have (as a bidding authority) entered into a contract to carry out work and have done so in contravention of section 4 above,
- (b) have carried out work as regards which the conditions set out in section 7 above have to be but, in the circumstances, have not been fulfilled,
- (ba) have decided to carry out work as regards which (if the work is carried out in accordance with the decision) those conditions will have to be but, in the circumstances in which it is proposed to carry it out, will not be fulfilled,
- (c) have carried out work in circumstances where section 9 above has not been complied with for the year concerned in relation to the defined activity within which the work

falls or in relation to an account required by that section to be kept for the year concerned as regards the activity,

(d) have carried out work in circumstances where section 10 above has not been complied with for the year concerned in relation to the defined activity within which the work falls, or

(e) have carried out work in circumstances where section 11 above has not been complied with for the year concerned in relation to the defined activity within which the work falls or in relation to a report required by that section to be prepared for the year concerned as regards the activity,

he may serve on the authority a written notice falling within subsection (2) below"

There are two preliminary points to note about the powers contained in S13(1) of the 1988 Act. First, the powers contained in S13 and 14 of the 1988 Act, can only be exercised if "it appears to the Secretary of State" that an authority has failed to comply with one of the provisions listed in S13(1) or S19A(1) respectively. It is worthy of note that the statutes establish no procedure for informing the Secretary of irregular conduct in relation to any of the activities listed: the legislation is silent as to the means by which he is kept informed¹. Second, S13(1) limits the exercise of these powers to use in the "financial year beginning in 1989 or in a subsequent financial year".

The list of activities contained in S13(1) extends not only to the conduct of the tendering process, but to a variety of matters regarding the performance of work carried out by DSOs. The precise scope of matters which the Secretary of State may exercise his powers in relation to will now be considered.

1: Failures to comply with tendering conditions

The first set of circumstances where the Secretary of State may exercise his powers is where there appears to him to be a contravention of the tendering conditions. Section 13(1)(a) refers to contraventions of the works contract regime contained in the 1988 Act. However, legislative developments will render these regimes obsolete in Scotland and Wales, and it is likely that legislative

¹ The relevance of this element of vagueness will be discussed below

changes will be effected in England²: it is therefore unnecessary to discuss these provisions further.

More importantly, S13(1)(b) and (ba) permit the Secretary of State to exercise his powers whenever it appears to him that there has been a failure to comply with the provisions of the functional work regime contained in the 1988 Act. The wording of S13(1) is noteworthy. The Secretary of State is allowed to initiate the procedure contained in S13 not only once work has commenced but also as soon as the decision has been taken as to who is to perform the work³. The apparent failure of an authority to comply with any of the provisions of S7 of the 1988 Act⁴ will allow the Secretary of State to initiate the S13 procedure. Thus, for example, anti-competitive conduct will be investigated using the S13 power. One peculiarity must be noted, however. As S13(1)(b) refers to a failure of an authority to comply with the conditions contained in S7 of the 1988 Act with regard to work which it has carried out, one must remember that the conditions contained in S7 do not relate solely to the conduct of the tendering process: the final condition "is that in carrying out the work the authority comply with the detailed inspection of it" prepared for the purposes of the tendering process⁵. Thus, as regards work performed under the 1988 Act the Secretary of State may exercise his powers to address not only failures in the conduct of the tendering procedure, but also failures as regards the performance of work by a DSO.

2: Failure to keep the required accounts

The second set of circumstances in which the Secretary of State may use his powers relates to the failure of a local authority to maintain accounts regarding the work which it has performed in the manner prescribed by the legislation⁶. Section 13(1)(c) authorises the issue of a notice to an authority when it appears that it has failed to maintain accounts for each defined activity in accordance with S9 of the 1988 Act, and related delegated legislation.

² See Ch2

³ See S13(1)(ba)

⁴ For the precise content of these provisions see Chapter 2

⁵ S7(8)

⁶ See Part III, chapter 1 for a discussion of this duty

3: Failure to achieve financial objective

The third reason why the Secretary of State may wish to exercise his powers is where it appears that a local authority has failed to achieve the financial objective which it is required to meet⁷. Local authorities are required to achieve annually a financial objective specified by the Secretary of State in relation to each category of work, by virtue of S10 of the 1988 Act: the practice has been to specify a rate of return on capital employed. Consequently, where it appears that in any given year an authority has failed to meet its rate of return in relation to a particular activity, the Secretary is empowered by S13(1)(d) to issue the appropriate notice to a local authority.

4: Failure to comply with requirements regarding annual reports

Finally, by virtue of S13(1)(e) the Secretary of State may issue notices to authorities which fail to comply with their various duties regarding the issue of annual reports under S11.

THE CONTENT OF A SECTION 13 NOTICE

Having examined the circumstances in which the Secretary of State initiates the procedure which may ultimately result in sanctions being imposed on local authorities, the content of the notices which mark the formal initiation of the procedure must be considered. Section 13(2) of the 1988 Act declares that:

"The notice is one which-

- (a) informs the authority that it appears to him that in a financial year identified in the notice they have acted as mentioned in one of the paragraphs (so identified) of subsection (1) above,
- (b) identifies the work concerned and states why it appears so,
- (c) contains the requirement mentioned in subsection (3) below."

A S13 notice must therefore do three things. First, it must identify which of the provisions listed in S13(1) the Secretary of State believes has been contravened. Secondly, it must identify the work

⁷ See Part III, chapter 1 for a discussion of this duty

to which the notice relates, and why it appears to the Secretary of State that there has been a contravention of the statutory duty. Effectively, therefore, the Secretary of State must give reasons for issuing the notice. It is possible to issue several notices relating to the same work in the same financial year, and such notices may identify the same apparent contraventions, or may be issued in regard to the apparent contravention of one of the other statutory duties listed in S13(1)⁸.

Finally, the notice issued by the Secretary of State must require:

"...that the authority submit to him within such time as is specified in the notice a written response which-

(a) states that they have not acted as mentioned in the paragraph concerned of subsection (1) above and justifies the statement, or

(b) states that they have acted as so mentioned, and gives reasons why he should not give reasons why he should not give a direction under section 14 below."⁹

The final element of the notice must inform the authority to which it is issued of the date by which the Secretary of State must receive what is effectively its defence to the notice, and also inform the authority of the two defences available to it.

At this stage the authority which has been served with the notice has three choices: it can decide not to reply to the notice, and thus let the Secretary of State take whatever course of action he desires; it can reply to the notice, stating that it has not acted in the manner alleged; or it can admit to acting as alleged in the notice, and seek to explain its conduct in the hope that it can evade one of the sanctions contained in S14, in which case it has been opined that the Secretary of State should give due consideration to the possibility of not issuing a S14 notice¹⁰. In practice, however, the authority will have deliberated over what course of action it will take for some considerable time prior to the issue of a S13

⁸ S13(5) of the 1988 Act

⁹ S13(3)

¹⁰ See *Ettrick and Lauderdale D.C. v Secretary of State For Scotland* 1995 SLT 996 at p 1000 E-F

notice. It would appear that the practice adhered to is for the Secretary of State, once it appears to him that one of the appropriate statutory duties has not been complied with, or when he receives a complaint to that effect, informally makes the substance of the complaint known to the authority in question, and asks it to comment. Once the reply to this extra-statutory inquiry is received, the Secretary of State will consider it, and decide if it is necessary to exercise his statutory powers. If he decides to use them, he will issue a S13 notice: if not, he will inform the authority of his decision not to exercise his powers¹¹. This extra-statutory procedure has two advantages. First, and most relevant to the present discussion, it informs authorities in advance of potential problems, and allows them to consider in advance the courses of action available to them if a S13 notice is issued. Secondly, it would appear that the use of this extra-statutory procedure allows the Secretary of State to "sift" alleged contraventions of statutory duties and to decide if a complaint is unjustified, and when it is appropriate to use his powers. It appears that minor, explicable, contraventions of the statutory regime, for example, failure to meet the prescribed rate of return on capital employed due to an innocent accounting error, will receive an informal, extra-statutory letter of admonition, as opposed to the full weight of the sanctions available to the Secretary of State¹².

What happens, however, following the issue of a S13 notice?

THE CIRCUMSTANCES IN WHICH DIRECTIONS MAY BE ISSUED.

The circumstances in which the Secretary of State may use his powers to give directions to local authorities are enumerated in S14(1). Section 14(1), for example, states:

"Subsection (2) below applies where-

(a) the Secretary of State has served a notice on an authority under section 13 above,

¹¹ See CCT and Local Government in England: Annual Report for 1993, DoE 1994,p7

¹² Interview with officers of Stirling DC, 19/4/94

(b) the time specified in the notice has expired (whether or not he has received a written response to the notice), and

(c) it still appears to him that the authority have acted as mentioned in the paragraph concerned of section 13(1) above."

A notice can thus only be issued under S14(2) of the 1988 Act if a number of conditions are fulfilled. First, the Secretary of State must have served a S13 notice on the authority prior to the issue of the S14 notice. Authorities must be informed of the case against them, in other words¹³. Therefore, if the Secretary of State were to issue a S14 notice without first issuing a S13 notice, there would clearly exist a procedural impropriety¹⁴ sufficient to render the Secretary of State's determination invalid. Similar issues would arise if the Secretary of State issued a S14 notice on different grounds from those contained in the S13 notice: as the authority would have had to address its defence of its actions to the matters contained in the S13 notice, it would be procedurally improper for the Secretary of State to issue a S14 notice on other grounds which the authority had not had the opportunity to deny or explain. This is emphasised by the second condition to be addressed, the requirement contained in S14(1)(c) that the Secretary of State may only exercise his powers of sanction "if it *still* appears to him that the authority have acted as mentioned in the paragraph concerned of section 13(1)" [emphasis added]. The use of the word "still" implies that the category of default addressed by the S14 notice should conform to the category and situation identified in the S13 notice. The final condition imposed by S14(1) is that, before S14 notice is issued, the time period specified in the S13 notice must have expired. This means that any notice issued prior to the expiry of that time period, even if it was obvious that the local authority in question was not going to respond, would be ultra vires. However, this provision also ensures that, where the time period has expired and the authority has not responded to the S13 notice, the Secretary of State may apply the maxim *quis silentiam consentire*, take the authority's silence as meaning that it consents to his view of the situation, and

¹³ Cf. *Kanda v Government of Malaya* [1962] A.C. 332

¹⁴ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 per Lord Diplock

use his S14 powers as he sees fit. Finally it should be noted that a S14 notice will only be valid if the Secretary of State did not misdirect himself in law as to the matters stated in the preceding S13 notice¹⁵

THE SANCTIONS WHICH MAY BE IMPOSED

The sanctions available to the Secretary of State are set forth in S14(2) of the 1988 Act, which states:

"The Secretary of State may direct that with effect from such date as is specified in the direction the authority-

- (a) shall cease to have power to carry out work falling within the appropriate activity,
- (b) shall cease to have power to carry out such work falling within that activity as is identified in the direction,
- (c) shall only have power to carry out work falling within that activity if such conditions as are specified in the direction are fulfilled, or
- (d) shall, as regards such work falling within that activity as is identified in the direction, only have power to carry it out if such conditions as are specified in the direction are fulfilled."

The Secretary of State may thus issue a variety of notices under S14. First, he may direct that the authority shall cease to have power to perform any work falling within the defined activity to which the notice relates¹⁶. Secondly, he may direct that the authority shall cease to have power to carry out such work falling within the defined activity as is specified in the notice¹⁷. Thus, where a defined activity has been exposed to competition as a number of contracts, the Secretary of State could issue sanctions relating to a single contract, as opposed to a defined activity in its entirety. The third option available to the Secretary of State is to issue a notice stating that an authority will be unable to carry out any work falling within a defined activity unless the conditions specified in the notice are complied with. Finally, a notice may specify that work of a particular description falling within a

¹⁵ See *Ettrick and Lauderdale D.C. v Secretary of State for Scotland* 1995 SLT 996

¹⁶ S14(2)(a)

¹⁷ S14(2)(b)

defined activity may only be carried out by a DSO if certain conditions contained in the notice are fulfilled. The effect of these notices can be radical, removing from local authorities the power to perform certain work through its DSO, or even resulting in the closure of a DSO. While the Act may describe the content of such notices as "directions", it is more accurate to describe them as sanctions.

Two points must be made about the exercise of these powers. First, it was held in *R v Secretary of State for the Environment ex p. London Borough of Haringey* ¹⁸ that:

"When S14(1)(c) applies, the Secretary of State may issue directions as set out in ss14(2)(a), (b), (c) or (d). There is no express limitation on his discretion. By the general law the Secretary of State must exercise that discretion rationally and so as to promote the policy and objects of the Act which are to be determined by the construction of the Act by the Court (see *Padfield v Ministry of Agriculture* [1968] AC 997, [1968] 1 All ER 694)"¹⁹

Consequently, when it still appears to the Secretary of State, acting in accordance with the procedure set forth in either Act, that an authority has acted in the manner set forth in the S13 notice, he may choose which of the sanctions contained in S14 to apply. As the Act does not set limits on the exercise of his discretion as to which sanction should be used in particular situations, the only constraints are that the Secretary of State should act rationally, without regard to irrelevant considerations, taking into account all relevant considerations, and should use his discretion to promote the policy and objects of the Act. Thus, provided he exercises his discretion in accordance with the established public law principles, the Secretary of State may validly sanction a DSO for a relatively minor infringement of one of the provisions mentioned in S13(1) by directing that it shall no longer have power to carry out work falling within the activity in question. While domestic law does not recognise the existence of a distinct principle of proportionality which would constrain the Secretary of State's ability to use the

¹⁸ 2nd February 1994, unreported

¹⁹ See judgement of Ralph Gibson LJ

most severe sanctions for relatively minor infringements, the House of Lords has recognised that the proportionality of an action may be of relevance in establishing *Wednesbury* unreasonableness, and has not precluded the emergence of proportionality as a distinct ground of review at some point in the future²⁰, something which certain commentators believe to be "highly likely"²¹. Where there is a coincidence of the CCT legislation and the EC Services Directive, however, the principle of proportionality will apply to the enforcement of Community obligations²²

However, it appears that the Department of the Environment at least may be in the process of establishing a policy regarding the situations in which S14 notices will be used to preclude DSOs from competing for work²³. It has been indicated by a junior minister in speeches to the Public and Local Service Efficiency Campaign, and the Association of Direct Labour Organisations that the sanctions contained in S14(2)(a) and (b) of the 1988 Act will be used to prevent DSOs from competing for or carrying out work in four situations²⁴.

The first situation in which the most severe sanctions will be applied is where the DoE warns a local authority that it is acting anti-competitively, giving it the chance to rectify the alleged breach, but it continues to do so. This, however, very much depends on the DoE and the authority's respective views on what constitutes anti-competitive conduct: an obvious example of where there would be a divergence of opinion is the applicability of TUPE and the content of TUPE clauses in contract documentation²⁵. Secondly, the most severe sanctions would be imposed where an authority abandons the tender process when it appears that the DSO is not the

²⁰ *R v Home Secretary ex parte Brind* [1990] 1 All ER 469. See also on this point Jowell and Lester, *Proportionality: Neither Novel nor Dangerous*, in Jowell and Oliver, *New Directions in Judicial Review*. For a general overview of the issue of proportionality see Craig, *Administrative Law*, (3rd Ed. 1994) pp 411-421

²¹ See e.g. Craig, *Administrative Law* (3rd Ed. 1994) at p 421

²² *State v Watson and Belmann*, Case 118/75, [1976] ECR 1185, [1976] 2 C.M.L.R. 552

²³ DoE strengthens arsenal for enforcement of competition, 10/2/95 LGC 2

²⁴ See also DoE sets out tougher sanctions for banning DLOs 16/6/95 LGC 5

²⁵ See Ch 4 for a discussion

lowest tenderer. The third situation is where the DSO fails to achieve the rate of return on capital employed in spite of having been the lowest tenderer. This may have the greatest impact given that the statutory duties to meet the rate of return on capital employed are the ones with which local authorities have most difficulty complying. Finally, these sanctions will be utilised where "competition is poor" or the DSO's standard of service falls considerably below that set out in the specification. The imposition of these sanctions where "competition is poor" is quite disturbing: apart from the obvious subjectivity of this standard, the failure of the private sector to compete is a matter very often beyond the control of a local authority, as was recently illustrated by the failure of the private sector to bid for one contract which had been exposed to competition again because the Secretary of State had utilised his S14 powers to prohibit a DSO from carrying out a contract, or participating in the new award procedure²⁶. While it must be remembered that it is always open to a Minister to formulate a policy regarding the exercise of his powers, provided he is willing to derogate from that policy in an appropriate case²⁷, it must also be borne in mind that the exercise of his powers must be consistent with the policy and purposes of the Act²⁸. While the other situations in which it has been suggested that the Secretary of State will use his most severe powers of sanction appear to be consistent with the policy and purposes of the 1988 Act, their use where "competition is poor" cannot be so characterised. As Ralph Gibson LJ pointed out in *R v Secretary of State for the Environment ex parte Knowsley* regarding the 1988 Act:

"The purpose of the Act is not, as I understand it, primarily to secure to contractors opportunities of bidding for and obtaining contracts for the performing of functional work for local authorities. The purpose is rather to secure that local authorities will only undertake such activities ... if they can do so competitively ..."²⁹

²⁶ See Borough ordered to re-tender work after lack of private bids, 28 April -5 May 1995 MJ 7, regarding Haringey LBC, whose DSO was prevented from tendering for a contract

²⁷ *British Oxygen Co. Ltd. v Minister of Technology* [1971] AC 610

²⁸ *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997

²⁹ *R v Secretary of State for the Environment ex parte Knowsley*, 31/7/91

To impose the most draconian sanction available in circumstances where "competition is poor" suggests that local authorities should be penalised not only for their own failures to act competitively, but also for the private sector's lack of interest in tendering: this is tantamount to suggesting that the purpose of the legislation is to secure opportunities for the private sector to secure contracts, something which is clearly at variance with the purpose of the legislation identified in the dicta contained in *ex parte Knowsley*. However, it must be borne in mind that, while there have been two public pronouncements regarding the adoption of this policy regarding the use of the most severe sanctions, there has yet been no official indication or evidence of its adoption. Moreover the position in Scotland is unclear, there having been no pronouncement on the use of sanctions as yet.

Secondly, it would appear that the Secretary of State enjoys considerable discretion in the exercise of the powers contained in S14(2)(c) and (d) of the 1988 Act, which permit him to impose conditions precedent to DSOs being permitted to carry out the work which is subject to the notice. In *R v Secretary of State for the Environment ex.p. Knowsley M.B.C. and others*³⁰, for example, it was held that the Secretary of State could impose a condition to the effect that an authority must re-tender the work which had been awarded to its DSO and, if its DSO were successful again, must show that the conditions contained in S7 of the 1988 Act had been fulfilled and seek the consent of the Secretary of State to the DSO carrying out the work. As Ralph Gibson LJ commented in his leading judgement:

"By section 14(2)(c) the powers of the Secretary of State, when they arise, include the giving of a direction that the authority 'shall only have power to carry out ...[the]...work if such conditions as are specified in the directions are fulfilled'. The Secretary of State could not use that power to require compliance with a condition which is not in proper furtherance of the legislative purpose of this part of the Act as determined by the court. Nor could the Secretary of State lawfully impose a condition which, although in proper furtherance of that purpose, utilised in effect a sanction not permitted by the Local Government Act 1988. Condition 3(b) [the sanction at issue] was not properly phrased

³⁰ 31 July 1991, unreported

to express the intention of the Secretary of State: it said that the authority must 'after fulfilling all the conditions contained in section 7 obtain the consent'. The intention was that the authority was to apply for consent on fulfilling the conditions and, on showing that the conditions were fulfilled, consent would be given. "

Thus there are two constraints on the nature of the conditions imposed on local authorities by the Secretary of State: such conditions must be intended to further the proper purposes of the Act, and they must not be conditions which are not permitted by the Act, even though they apparently further the purposes of the Act. It is difficult to envisage situations where a condition would not be permitted by the Act, given the terminology used S14. However, the requirement that conditions should be intended to fulfil the proper purposes of the Act leaves the Secretary of State with considerable latitude.

As a result of *R v Secretary of State for the Environment ex p. Knowsley MBC and others*, several amendments were made to the 1988 Act, by the Local Government Act 1992³¹. Section 14(4A) and (4B) declare:

"(4A) The conditions that may be imposed by a direction given under this section in relation to the carrying out of any work include a condition restricting the carrying out of work to cases where-

(a) the Secretary of State is satisfied as to any matter specified or described in the direction, or

(b) the work is carried out under and in accordance with an authorisation or consent given for the purposes of the direction by the Secretary of State.

(4B) Where a direction under this section imposes any condition in relation to the carrying out of any work, that direction may provide that the requirement that the condition is fulfilled is to have effect, in relation to that work, instead of any requirement which (apart from the direction) would have effect in relation to that work by virtue of this part."

These amendments permit the Secretary of State to do a variety of things when issuing a direction. First, it is obvious that S14(4A) is intended to forestall challenges to the issue of S14 notices on

³¹ S11 and Schedule 1

similar grounds to *Knowsley* . Section 14(4A)(a) permits the Secretary of State to require that a condition which he specifies in the S14 notice must be fulfilled to his satisfaction prior to the local authority being able to perform work via its DSO. Section 14(4A)(b) permits the Secretary of State to require as a condition precedent to an authority performing work via its DSO that it should have sought his authorisation or consent before carrying out work and performs the work in accordance with his authorisation. This provision is perhaps only relevant to the situation where an authority has been forced to re-tender work, and must, after conducting the retendering exercise, seek the Secretary of State's consent before beginning performance of the work subject to the S14 notice. It should be noted that the content of a notice may "include" the directions listed in S14(4A): these provisions are without prejudice to the other conditions which the Secretary of State may impose.

The second provision inserted in S14, S14(4B), is potentially the most invidious provision contained in Part I of the 1988 Act. As this provision refers to conditions in a S14 notice which will prevail over any contrary requirement contained in Part I of the 1988 Act, it in effect allows the Secretary of State to disapply any of the provisions of Part I of the Act. Thus, any of the tendering provisions may be disapplied or altered, with a potentially serious effect for the fairness and objectivity of a retendering exercise. The most obvious examples would be the revision of the timing of the stages of the tendering process, or the definition of certain conduct as anti-competitive in relation to a particular tendering exercise: however, all tendering exercises must comply with the minimum standards of objectivity contained in the EC public procurement regime. This provision would also allow the requirements as to DSO accounts, annual reports, and financial objectives to be effectively suspended or altered if conditions specified in a S14 notice were met.

ALTERATION OF S14 NOTICES.

The issue of a S14 notice does not necessarily conclude the process, however. The 1988 Act contains provisions facilitating the alteration of such notices. Section 14(3) of the 1988 Act provides that:

"Where the Secretary of State has given a direction under subsection (2) above or this subsection (the previous direction) he may give a direction (a new direction) that with effect from such date as is specified in the new direction-

(a) any prohibition applying by virtue of the previous direction (whether the prohibition applies outright or if conditions are not fulfilled) shall cease to apply,

(b) any outright prohibition applying by virtue of the previous direction is replaced by a prohibition applying (as regards the same work) if conditions specified in the new direction are not fulfilled, or

(c) any prohibition applying as regards work by virtue of the previous direction (whether the prohibition applies outright or if conditions are not fulfilled) is replaced by a prohibition which applies only to such of that work as is identified in the new direction but which is otherwise in the same terms as the prohibition in the previous direction."

In addition, S14(4C) states that:

"Without prejudice to subsection (3) above, the power to give a direction under this section shall include power, at any time, to make such variations of a direction under this section as may be agreed with the authority to which the direction relates"

The Secretary of State thus enjoys considerable scope to vary directions. First, by virtue of S14(3)(a) the Secretary of State may simply issue a new direction stating that the previous S14 notice shall cease to apply. Secondly, S14(3)(b) permit him, in effect, to reduce the severity of the notice by changing it from being one where an authority is prohibited from carrying out the work defined therein in any circumstances, to one where the authority will be able to perform work via its DSO if certain conditions set out in the revised notice are fulfilled. Third, if a notice either prohibits an authority from performing an activity via its DSO in any circumstances, or requires the authority to comply with certain

conditions prior to performing any work falling within that activity, the Secretary of State may reduce the scope of the prohibition by redefining the range of work which an authority is prohibited from carrying out, or can carry out only after fulfilling conditions³². The prohibition or conditions remain the same, only the scope of the work to which the original notice applied is changed. Finally, it is significant that S14(4C) gives the Secretary of State power to make such variations to a notice as he agrees with the affected authority. Given that the variations are agreed with the authority in advance, the possibility of challenge is effectively excluded.

Section 16(2) of the 1988 Act provides that:

"Nothing in sections 13 and 14 above shall prejudice any remedy available to a person (apart from those sections) in respect of a failure to observe a provision of this Part."

The wording of S16(2), by referring to remedies available "apart from those sections", would appear to imply that the procedures contained in SS13 and 14 represent one particular remedy available to redress failures to conform with the provisions of Part I of the 1988 Act. The remedies available to aggrieved contractors will be discussed briefly below. However, it must be remembered that, to the extent that the EC Services Directive applies, those aggrieved by failures of authorities to comply with the procurement regime must be able to seek redress at a national level by pursuing a remedy consistent with the Compliance Directive³³. The extent to which the procedures under S13 and S14 of the 1988 Act comply with the Compliance Directive must now be considered.

THE STATUTORY PROCEDURES AND THE COMPLIANCE DIRECTIVE

As the procedures contained in the 1988 Act may be used to redress failures in the competition process, and there is a considerable overlap between domestic and EC legislation as to the manner in which tendering procedures are to be conducted, the

³² S14(3)(c)

³³ Directive 89/665

Compliance Directive prescribes the nature of the remedies which must be available to those aggrieved by failures which violate not only domestic provisions, but also the EC public procurement rules. It now remains to examine the extent to which the statutory sanction procedures conform to the Compliance Directive.

It must be emphasised that the provisions of S13 and S14 are only being examined here to the extent that they relate to the failures in the competition process: the Compliance Directive does not apply in situations such as those relating to failures to meet financial objectives, and can only be used to redress failures in the tendering process. There would appear, however, to be a number of points at which the statutory procedures in question are at variance with the provisions of Directive 89/665.

Article 1 of the Compliance Directive imposes three duties on Member States as to the system of remedies which must be put in place to redress failures to comply with the EC public procurement rules. Article 1(1) provides that Member States must take measures to ensure that, as regards contract award procedures falling within the scope of the EC public procurement Directives, decisions of contracting authorities which infringe Community law, or national rules implementing the law, "may be reviewed effectively and....as rapidly as possible". Article 1(2) requires Member States to ensure that there is no discrimination between undertakings seeking relief as a result of the Directive's distinction between national rules implementing Community law and other national rules. Article 1(3) states:

"The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public ...contract and who has been or risks being harmed by an alleged infringement." (Emphasis added)

Two issues arise as a result of Article 1 which call into question whether the procedures set out in S13 and S14 are capable of being characterised as being remedies. First, Article 1(1) of the Compliance Directive requires that review procedures should be as

rapid as possible. The DoE has stated that it has achieved its aim of completing the statutory action where anti-competitive behaviour has been alleged within 5 months in 75 per cent of cases. This figure is at variance with the experience of one of the authorities surveyed where the reply to two S13 notices had been under consideration by the Scottish Office for over a year³⁴. There is therefore some evidence that the statutory procedures are not conducted with sufficient expedition to be characterised as being 'as rapid as possible'. However, it is the second issue which is the more damning.

As was noted above, Article 1(3) requires that a Member State must ensure that review procedures are available to those aggrieved by the conduct of a tendering procedure "under detailed rules which the Member States may establish." Article 1(3) would appear to imply that where existing procedural rules cannot give effect to the duties imposed by the Directive and specific procedural rules are adopted, or in any situation where a State adopts new procedural rules to give effect to the Directive, the new procedure should be contained in "detailed rules". If we are to judge the provisions of S13 and S14 by that standard, we find that the procedure suffers from several deficiencies. The most serious deficiency regards the vital matter of how those procedures are initiated. The legal position is stated in the opening words of S13(1) which state that the notices initiating the procedures may be issued "if it appears to the Secretary of State" that certain statutory provisions have been contravened. As a matter of law this particular national "remedy" is initiated by the Secretary of State. The DoE may maintain that:

"Most allegations of anti-competitive behaviour are made against local authorities by external contractors. Some allegations are made by trade associations, opposition councillors or members of the public. In addition, the Secretary of State can take action on his own initiative."³⁵

³⁴ Interview with officers of Strathclyde R.C., 1/12/93, 30/3/95

³⁵ CCT And Local Government in England: Annual Report for 1993, DoE 1994, p7

but this only reveals the parties by whom the Secretary of State is informed of alleged breaches of the tendering process. Nothing is revealed of the mechanics of bringing a complaint. However, it is also clear that there are no rules as to the procedure for informing the Secretary of State of irregularities in an award process. The fact that no "detailed rules" exist as to who can inform the Secretary of State of irregularities in a contract award, or by what means he is to be informed, indicates the fundamental flaw which ensures that the statutory procedures cannot be a remedy for the purposes of ensuring compliance with the EC public procurement rules which apply whenever the CCT legislation and the EC public procurement Directives apply to the same tendering exercise: Article 1(3) indicates that the review procedures in Member States must be available "at least to any person having or having had an interest in obtaining a particular" contract, whereas the procedure set out in the statute is available only to the Secretary of State, who patently has never had any interest in obtaining the contract in question. Thus the statutory procedures clearly cannot be remedies as understood by the Compliance Directive, because they are insufficiently detailed as to the circumstances in which they are initiated, and they are incapable of being initiated as a matter of law by those who have been injured by a failure in the tendering process. Thus it is impossible for an aggrieved party to put forward cogent legal reasons via this procedure as to why they should be granted relief.

It would therefore appear that while the domestic view is that the procedures contained in S13 and S14 of the 1988 Act are a form of remedy, they are clearly incapable of fulfilling the criteria for remedies which are capable of being used to enforce the EC public procurement rules set out in Article 1 of the Compliance Directive. Bearing in mind the considerable identity of scope of the CCT legislation and the Services Directive this is an unsatisfactory situation, illustrating the extra-judicial nature of the Secretary of State's powers under these statutory provisions. The situation is more unsatisfactory if one bears in mind that the statutory tendering regime contains certain provisions which have no

equivalent in the EC Directive³⁶, thus opening up the possibility that these procedures may be perfectly valid as regards certain aspects of a tendering process, but incapable of application where the provision in question is supposed to implement the provisions of one of the EC public procurement regime. However, a sense of perspective must be maintained, and we must bear in mind that the extensive powers entrusted to the Secretary of State by Parliament are generally not used in order to redress failures in the competition process: in 1992, 8 notices were issued under S14, and the corresponding provision of the Local Government, Planning and Land Act 1980, regarding irregularities in the tendering process, as opposed to 11 notices relating to financial failure, while in 1993 the corresponding figures were 12 notices containing sanctions relating to tendering failures, and 11 relating to financial failures. However, far more S13 notices are issued to authorities for financial failures than for tendering irregularities: in 1992 there were three notices issued relating to financial failures for every one relating to an alleged tendering irregularity, with the ratio for 1993 rising to four notices relating to financial matters for every one concerning tendering irregularities³⁷. Thus, the Secretary of State is far more likely to initiate procedures using a S13 notice regarding financial failures, but is almost as likely to impose sanctions under S14 for tendering irregularities as he is for financial failures.

Having examined the Secretary of State's powers it now remains to examine the remedies which aggrieved tenderers will be able to pursue in court.

REDRESS VIA THE COURTS FOR BREACH OF THE TENDERING REGIME

In examining the remedies available to aggrieved tenderers one is again forced to recognise the impact of the EC public procurement regime upon this area of the law. Where a tendering exercise

³⁶ See Chapters 2,3

³⁷ CCT and Local Government in England: Annual Report for 1993, DoE 1994, pp 8-9

required by the 1988 Act also falls within the ambit of the Services Directive, then the system of available remedies must conform to the requirements of the Compliance Directive³⁸. The obligation to implement the Compliance Directive has been fulfilled by virtue of provisions contained in the Public Services Contracts Regulations 1993³⁹, which provide that contracting authorities owe a duty to contractors to comply with those Regulations and "any enforceable Community obligation"⁴⁰ where a contract falls within the ambit of, and above the thresholds set in the Services Directive. Breach of this duty shall be actionable by any contractor "who, in consequence, suffers, or risks suffering, loss or damage"⁴¹, the appropriate forum for such an action being the High Court in England and Wales, and the Court of Session in Scotland. However, proceedings may not be brought unless the contractor has first informed the authority of the breach or apprehended breach of duty and indicated his intention to bring proceedings⁴², and must be brought "promptly and in any event within 3 months from the date when grounds for bringing the proceedings first arose unless the Court considers that there is good reason for extending the period"⁴³: it would appear that, even if brought within three months, it is still possible that proceedings may be barred because they have not been brought "promptly"⁴⁴. Having considered who may bring proceedings, the appropriate forum and the time limits pertaining to such proceedings it now remains to examine the remedies which are available to aggrieved contractors

³⁸ Directive 89/665. For a Detailed discussion of the Compliance Directive see Arrowsmith, *Enforcing the Public Procurement Rules: Legal Remedies in the Court of Justice and National Courts* in Arrowsmith (Ed.) *Remedies Enforcing the Public Procurement Rules*. For a discussion of the system of remedies available in domestic law for enforcing the EC procurement rules see Arrowsmith, *Enforcing the E.C. Public Procurement Rules: the Remedies System in England and Wales* (1992) 1 P.P.L.R. 92 and Weatherill, *Enforcing the Public Procurement Rules in the United Kingdom* in Arrowsmith (Ed.) *Remedies for Enforcing the Public Procurement Rules*

³⁹ 1993 S.I. 3228, Regulation 32

⁴⁰ 1993 S.I. 3228, Regulation 32(1)

⁴¹ Regulation 32(2)

⁴² Regulation 32(4)(a)

⁴³ Regulation 32(4)(b)

⁴⁴ For a discussion of this point see e.g. Arrowsmith, *Enforcing the E.C. Public Procurement Rules: the Remedies system in England and Wales* (1992) 1 P.P.L.R. 92 at p104

when a tendering exercise conducted under the 1988 Act also falls within the ambit of the Services Directive.

Regulation 32(5) of the Public Services Contracts Regulations provides that:

" ... in proceedings brought under this regulation the Court may-

- (a) by interim order suspend the procedure leading to the award of the contract in relation to which the breach of duty owed pursuant to paragraph (1) above is alleged, or suspend the implementation of any such decision or action taken by the contracting authority in the course of following such procedure; and
- (b) if satisfied that a decision or action taken by the contracting authority was in breach of the duty owed pursuant to paragraph (1) above-
 - (i) order the setting aside of the decision or action or order of the contracting authority to amend any documents, or
 - (ii) award damages to a services provider who has suffered loss or damage as a consequence of the breach, or
 - (iii) do both of those things."

However, Regulation 32(6) states that:

"In any proceedings under this regulation the Court shall not have the power to order any remedy other than an award of damages in respect of a breach of the duty owed pursuant to paragraph (1) above if the contract in relation to which the breach occurred has been entered into."

The aggrieved contractor thus may have a variety of remedies available to him where he feels that the conduct of a tendering exercise has offended against the terms of the procurement directives or some other principle of community law. However, it would appear from the use of the word "may", that these remedies may be discretionary, not mandatory⁴⁵. First, during the course of the award procedure the contractor may seek an interim suspension of the award procedure on the ground that the authority has breached one of the duties imposed upon it by Community law. However, this is only an interim measure, and there must consequently be remedies

⁴⁵ On this point see Arrowsmith, *Enforcing the EC Public Procurement Rules: The Remedies System in England and Wales* (1992) 1 P.P.L.R. 92 at pp 100-1

available before the Court following fuller consideration of the case. Thus the Court may set aside a decision of an authority which is in breach of Community law, or order the amendment of documents (something which is of considerable relevance where it is alleged that a specification is discriminatory, for example), but the Court may not order the setting aside of an award procedure once a contract has been entered into. Therefore, until a contract has been entered into the Court may set aside an award procedure, but after it has been entered into it possesses no power to do so. The obvious problem which arises here is where a situation exists akin to that in *Ettrick and Lauderdale D.C. v Secretary of State for Scotland* ⁴⁶, where the contract documents issued with the invitation to tender state that the submission of a tender will constitute the acceptance of the tendering conditions contained therein, and that the submission of a tender will constitute an offer which, once accepted by the authority will constitute a contract. In such a situation a contract is concluded as soon as the result of the award procedure is intimated to the successful tenderer, thus depriving other tenderers of the opportunity to have the procedure set aside. Thus, aggrieved contractors may often be forced to accept that, if they have an objection to any aspect of the award procedure they should raise the matter prior to the award of the contract if they wish to have a realistic opportunity of challenging the award procedure, having it set aside, and subsequently participating in an objective tendering exercise. Otherwise, aggrieved contractors will find that the only effective remedy available to them is to seek damages for the loss or damage which they have suffered as a result of the breach of Community law.

The provisions of regulation 32 of the Public Services Contracts Regulations 1993 provide a succinct indication of the remedies available to aggrieved contractors for a breach of Community law where a tendering exercise conducted under 1988 Act also falls within the ambit of the public procurement directives. However, what remedies are available to aggrieved contractors where a tendering exercise does not fall within the scope of the directive, or where the aggrieved contractor wishes to rely on the provisions of

⁴⁶ 1995 SLT 996

the 1988 Act rather than found his case on a breach of community law, something which is quite conceivable because of the divergences between domestic law and the Services Directive?

In determining the remedies available to aggrieved contractors one must first ask: what is the evil to be addressed? An aggrieved contractor wishes to show that an authority has failed to comply with the provisions of the 1988 Act in awarding work. Aggrieved contractors will therefore allege a breach of one of the duties imposed by the statutes⁴⁷. It was accepted in *Colas Roads Ltd v Lothian Regional Council* ⁴⁸ that it is competent for a contractor to bring an action for breach of statutory duty where he avers an apparent failure to comply with the tendering regime prescribed by the statute. *Colas Roads* concerned the prohibition of anti-competitive conduct contained in S9(4)(aaaa) of the Local Government, Planning and Land Act 1980⁴⁹, but it would appear that an action for breach of the duties imposed by the other provisions contained in the 1980 Act, and the 1988 Act, would also be competent.

The appropriate forum for such an action would be the High Court in England and Wales, and the Court of Session in Scotland, as the action would have to be raised using the judicial review procedure contained in R.S.C. Order 53 in England and Wales, and by an application to the supervisory jurisdiction of the Court of Session under Rule of Court 58 in Scotland. A contractor could seek an injunction or interdict, or interim injunction or interdict, to prevent an authority from proceeding further with a tendering procedure once it appears that the authority has breached one of its statutory duties. In England a contractor could seek a declaration, and in Scotland a declarator, that an authority had breached its statutory duty: for reasons which will become apparent this may well be the most appropriate remedy. In England certiorari, mandamus and prohibition are also available under order 53. In

⁴⁷ See on this point e.g. *Meade v Haringey LBC* [1979] 1 W.L.R. 637, *Watt v Kesteven C.C.* [1955] 1 QB 408, *Walker v Strathclyde R.C.* (No.1) 1986 SLT 527

⁴⁸ 1994 SLT 396

⁴⁹ This is the equivalent of the prohibition contained in S7(7) of the 1988 Act

Scotland reduction, suspension, and payment of damages are probably also competent remedies. However, once again one must recognise that the possibility of obtaining a remedy which a contractor will consider to be both effective and satisfactory diminishes when the Court is faced with a concluded contract: as the available remedies are discretionary it is highly likely that a Court will be unwilling, for example, to reduce a concluded contract because of the ramifications which that may have not only upon the parties to the contract and most importantly the contract's performance, but also upon wider commercial relations such as those with sub-contractors and suppliers, although it may have fewer qualms about declaring that a breach of statutory duty has occurred⁵⁰. However, it should be remembered that under both Order 53 and Rule of Court 58 an aggrieved contractor may seek damages for a breach of statutory duty.

CONCLUSIONS

An aggrieved contractor wishing to seek redress against a local authority for a perceived breach of the 1988 Act's tendering provisions may simply wish to take the authority in question to court. Should he choose to do so a variety of remedies are available. Certainly, where the tendering process at issue also falls within the ambit of Directive 92/50, a variety of effective remedies must be available in order to satisfy the provisions of the Compliance Directive. However, while the remedies available to aggrieved contractors permit the court to suspend or set aside an award procedure, and to alter contract documents which contravene the Services Directive or other principles of EC law, significantly, it does not allow a court to set aside a contract which an authority has been entered into, but does permit the award of damages. Alternatively, where an aggrieved contractor wishes to rely, or because of the subject matter or value of the proposed contract must rely, on the provisions of the 1988 Act, the most likely course

⁵⁰ See e.g. *R v Monopolies and Mergers Commission ex parte Argyll Group plc* [1986] 2 All ER 256, where it was held that discretionary relief should be withheld in the interests of good public administration where granting it would have a disruptive effect on established commercial relationships. See especially Donaldson MR at p 266b-h

of action is that he will seek to review the authority's decision on the grounds that it has breached its statutory duties. While he may seek to have the decision of the local authority reduced, it is unlikely that the aggrieved contractor will succeed once a contract has been concluded: once again, while declarator and damages may be sought, the Court would be reluctant to use its discretion to grant a remedy which would disrupt established commercial relations and prejudice certainty and good administration. Thus an aggrieved contractor will find that it is highly unlikely that he will succeed in having an award process reduced after a contract has been concluded, although if he wishes to act prior to the conclusion of a contract a wider range of remedies will be available.

However, the most obvious route for an aggrieved contractor to take is to make a complaint to the Secretary of State in the hope that he will exercise his powers under S13 and S14 of the 1988 Act. Indeed it would appear that these powers are intended to be the main avenue for redressing failure to comply with the tendering procedures, and the screen of anonymity which S13 gives to those making complaints by adopting the formulation that the procedure is initiated by the Secretary of State appears to be more attractive to aggrieved contractors than the more orthodox, expensive, and public route of raising a civil action. The powers contained in S13 and S14 permit the Secretary of State to investigate apparent failures to comply with the statutory tendering regimes, and, where it appears to him that there has been a failure to comply with those procedures, he may, amongst other things, compel an authority to re-tender the work in question, possibly in accordance with conditions imposed by him, or may withdraw from an errant authority the right to perform the work in question, thus ensuring that it will be performed by the private sector in future. This would probably be the most attractive result for an aggrieved contractor, as it would give him another opportunity to tender for the work. However, one must note that the vast majority of notices issued by the Secretary of State relate not to failure to comply with the tendering procedures, but to failures to achieve the statutory rate of return on capital employed when performing the work in question. The other major failing in this procedure, from a contractor's point of view, is that

it is formally initiated by the Secretary of State, not the contractor. The contractor therefore has no control over what happens once the initial complaint has been made to the Secretary of State. The fact that the procedure is formally initiated by the Secretary of State and not the contractor also means that this procedure cannot be considered to be a remedy for the purposes of the Compliance Directive.

It would thus appear that while there are potentially various avenues of redress available to the aggrieved contractor, each has its limitations. Moreover, an examination of each available course of action reveals that, in effect, a contractor seeking to reduce an award procedure has little hope of doing so.

CHAPTER 6

PART II OF THE LOCAL GOVERNMENT ACT 1988: THE NON-COMMERCIAL CONSIDERATIONS REGIME

The Local Government Act 1988 did not only establish a compulsory competitive tendering regime for procurement of services discussed above: by virtue of Part II it also established the "non-commercial considerations regime" which permeates all aspects of local government procurement, and is intended to preclude authorities from using their procurement powers to further their wider policy objectives¹. Thus, in addition to conforming to the requirements of the tendering regime discussed above local authorities must also ensure that the tendering exercises required by Part I of the Local Government Act 1988 are conducted in accordance with the provisions of Part II of the 1988 Act.

Part II of the 1988 Act does essentially three things. First, it prohibits authorities from taking into account non-commercial considerations both up to and after the award of a contract². Secondly, it contains provisions as to the rights of action of those harmed by a decision which violates the non-commercial consideration regime³. Finally, it places a duty on authorities to provide reasons for certain decisions relating to the award of contracts, and certain decisions taken in the course of the contract⁴. It now remains to examine each of these aspects of the non-commercial consideration regime in turn.

THE PROHIBITION OF TAKING NON-COMMERCIAL CONSIDERATIONS INTO ACCOUNT

The prohibition of taking non-commercial considerations into account is essentially contained in S17. The general prohibition is set out in S17(1):

¹ On this matter see e.g. Daintith, Regulation by Contract: the New Prerogative [1979] 32 C.L.P. 41; Arrowsmith, Public Procurement as an Instrument of Policy and the Impact of Market Liberalisation [1995] 111 LQR 235

² Sections 17, 18, 21

³ S19(7)-(9)

⁴ S20

"It is the duty of every public authority to which this section applies, in exercising, in relation to its public supply or works contracts, any proposed or any subsisting such contract, as the case may be, any function regulated by this section to exercise that function without reference to matters which are non-commercial matters for the purposes of this section."

Four matters must be addressed in the course of examining this prohibition. First, to which "public authorities" does this prohibition apply? Second, to which contracts does the prohibition apply? Third, what "functions" are regulated by this section? Finally, what are the non-commercial matters which must not be taken into account?

The first two questions can be dealt with fairly quickly. The "public authorities" subject to this prohibition are listed in Schedule 2 of the 1988 Act⁵, and, most significantly for the purposes of this discussion, includes a local authority, which is defined as meaning, in England and Wales, a county, district, London borough, parish or community council, the Council of the Isles of Scilly, and the Common City of the City of London; and in Scotland a council established by the Local Government Act 1994 and any joint board or committee thereof. Moreover, S17 applies if an authority is exercising the functions regulated by it on behalf of a Minister of the Crown⁶, or is exercising the functions of another authority pursuant to an arrangement under S101 of the Local Government Act 1972 or S56 of the Local Government (Scotland) Act 1973⁷. Thus every conceivable layer of local government must comply with the non-commercial considerations regime.

The second matter to be discussed is which contracts this prohibition relates to. The definition of what constitutes a "public supply or works contract" is found in S17(3):

"The contracts which are public supply or works contracts for the purposes of this section are contracts for the supply of goods or materials, for the supply of services or

⁵ S17(2)

⁶ S19(5)

⁷ S19(6)

for the execution of works; but this section does not apply ... to contracts entered into before the commencement of this section."

The prohibition of taking into account non-commercial considerations therefore extends to every conceivable contract which a local authority may enter into: all contracts for the performance of works, or of the supply of goods and services fall within the ambit of the prohibition. It should be noted that, unlike the provisions implementing CCT, there is no financial threshold limiting the application of the prohibition to contracts of in excess of a specific value. However, there is one limiting factor: contracts entered into prior to the commencement of S17 will not be subject to any element of its provisions. Thus, as S23 declares that Part II of the 1988 Act shall come into force 14 days after the date on which the Act was passed, and the Act received the Royal Assent on 24 March 1988, any contract entered into prior to 7 April 1988 will not be subject to any of S17's provisions. One must, however, question how many such contracts still exist at this remove.

The final two issues, the "functions" relating to a local authority's exercise of its contractual powers which are regulated, and the matters which are defined to be non-commercial, are slightly more complex and merit individual consideration.

The functions regulated by S17

The "functions" of local authorities regulated by S17 are enumerated in S17(4), which states:

"The functions regulated by this section are-

- (a) the inclusion of persons in or the exclusion of persons from-
 - (i) any list of persons approved for the purposes of public supply or works contracts with the authority, or
 - (ii) any list of persons from whom tenders for such contracts may be invited;
- (b) in relation to a proposed public supply or works contract with the authority-
 - (i) the inclusion in or the exclusion of persons from the group of persons from whom tenders are invited,
 - (ii) the accepting or not accepting the submission of tenders for the contract,
 - (iii) selecting the person with whom to enter into the contract, or

- (iv) the giving or withholding approval for, or the selecting or nominating, persons to be sub-contractors for the purposes of the contract; and
- (c) in relation to a subsisting public supply or works contract with the authority-
 - (i) the giving or withholding approval for, or the selecting or nominating, persons to be sub-contractors for the purposes of the contract, or
 - (ii) the termination of the contract."

A very wide range of activities in the course of the contractual process therefore fall within the ambit of the S17 prohibition: at one extreme elements of the procedure prior to the formation of contracts are regulated, while at the other extreme, the termination of a contract falls within the scope of the prohibition. The various functions must be examined in a little more detail, however.

By virtue of S17(4)(a) two functions must be performed in accordance with the provisions of S17. The first is the inclusion in or exclusion⁸ of persons from a list of approved contractors⁹. A local authority often maintains a list of approved contractors in any given field (for example, the supply of building materials or office stationary, or performance of minor building repairs). The authority has basically satisfied itself by applying certain criteria that a potential contractor is a suitable person with whom to contract. In relation to such lists, S21 provides that, where an authority has issued questionnaires including, notified potential contractors of its intention to take into account, or made policy statements referring to, non-commercial matters, a person subsequently excluded from the list will be deemed to have been excluded by an authority having reference to non-commercial matters, and a new list of approved contractors will have to be compiled. This task should have been completed soon after the 1988 Act came into force, and consequently this transitional provision need detain us no further. The second is the inclusion in, exclusion or removal¹⁰ of persons from a list of persons from whom tenders for public supply or works contracts may be invited¹¹. In relation to many contracts there is little practical difference between these two lists: if a person is

⁸ Exclusion includes removal by virtue of S17(8)

⁹ S17(4)(a)(i)

¹⁰ See S17(8)

¹¹ S17(4)(a)(ii)

not included in the list of approved contractors, that person will invariably not be included in a list of those from whom tenders will be invited. In relation to the list of persons from whom tenders may be invited, it is possible to see the influence of the CCT provisions on this provision¹². While authorities may maintain lists of those from whom tenders may be invited for other contracts, this is the most obvious example. However, while the lists covered by the prohibition are easily ascertained, it is not immediately obvious at which point the general prohibition takes effect: does it apply only at the point at which an authority determines that a potential contractor will be excluded from a list, or is the prohibition effective at some point prior to that determination?

A cursory examination of S17(4)(a), which refers to "the inclusion of persons in or the exclusion of persons from" the lists identified therein, would appear to suggest that only once a determination is made taking into account non-commercial matters will the prohibition be contravened. However, in spite of the wording of S17(4)(a), one must have reference to the general prohibition contained in S17(1). Section 17(1) places a duty on authorities to exercise "any function regulated by this section ... without reference to matters which are non-commercial" (emphasis added). Thus the functions listed in S17(4) must be exercised without reference to non-commercial matters. If the formulation chosen had prohibited decisions being taken in accordance with non-commercial matters, this would have implied that the crucial point in time is when a decision is taken that a potential contractor will be excluded from or included in a list. However, the temporal focus is shifted by the use of "reference" in the general prohibition. By prohibiting "reference" to non-commercial matters in the exercise of the functions contained in S17(4)(a), an authority will therefore contravene the prohibition not when it includes or excludes a contractor in a list, but at the point at which it "refers" to a non-commercial matter. Some may question whether there is any practical value in such a distinction, as it will only be obvious that a contractor is included or excluded in a list once it has been

¹² See e.g. S9(4) of the Local Government, Planning and Land Act 1980, which is predicated on tenders being invited from an approved list of tenderers

published. Such a suggestion would ignore the fact that lists of approved contractors are compiled following the issue of questionnaires to contractors, and an assessment of their technical and financial capacity. If a contractor applied to be admitted to a list of approved contractors and was issued with a questionnaire including questions relating to non-commercial matters, then the authority would *prima facie* have referred to non-commercial matters, and contravened the prohibition. At this point the potential contractor could raise an action for declarator, or seek to interdict (or injunct) the authority from taking a decision on inclusion in or exclusion from a list on the basis of criteria which refer to a non-commercial consideration¹³.

The next set of functions regulated by S17 are set out in S17(4)(b) and relate not to the compilation of lists, but to the award of a contract. Four distinct activities relating to the award of a contract are subject to the general prohibition set out in S17(1). The first function enumerated is the inclusion in, exclusion or removal¹⁴ of a person from the group of persons from whom tenders are invited¹⁵. Although this is not limited to tendering procedures conducted under the CCT legislation, this function correlates to the invitation of tenders required by S7(4) of the 1988 Act. Once again, it must be emphasised that it is not simply the final decision to include or exclude a person from the group from whom tenders will be invited which is regulated: the prohibition will be contravened at the point at which the authority refers itself to a non-commercial matter. Thus, if, for example, a pre-tender questionnaire¹⁶ used to decide which potential contractors who had expressed an interest in being awarded the contract should be invited to tender included a question referring to a non-commercial matter, the authority, by referring to that matter, would have contravened the prohibition contained in S17(1).

¹³ The various actions available to those prejudiced by a contravention of S17 will be discussed below.

¹⁴ See S17(8)

¹⁵ S17(4)(b)(i)

¹⁶ See chapter 2

The second function listed in S14(4)(b) is accepting or not accepting the submission of tenders by a potential contractor¹⁷. It is unlikely that a non-commercial consideration would be taken into account in accepting or rejecting a tender where CCT legislation applies. The reason for this is simple: as potential contractors are almost invariably required to answer questionnaires prior to being invited to submit tenders, if a non-commercial consideration is to be taken into account, it is much more likely to happen when assessing which contractors will be invited to submit tenders. As authorities are unlikely to invite a potential contractor to submit a tender without having investigated whether or not that contractor is suitable in accordance with the criteria which each authority applies in assessing interested contractors, extending the prohibition to this function only serves a useful purpose in two situations: the first is where some activity of a potential contractor, which falls within the ambit of a non-commercial matter, becomes unacceptable to an authority after an invitation to tender has been extended, and the authority decides not to accept the contractor's tender; the second is where an authority uses an open procedure in a competitive tendering exercise and refuses to accept a tender, although this does not fall within the classic CCT scenario.

The third function listed as being subject to the general prohibition contained in S17(1) is selecting the person with whom to enter into a contract¹⁸. Like the other functions listed in S17(4) this function is not just limited to CCT contracts. Indeed, the inclusion of this particular function illustrates that S17 applies to all local authority contracts. Thus if any contract is awarded with reference to non-commercial matters, this will amount to a contravention of S17(1)'s general prohibition.

While the first three paragraphs of S17(4)(b) list functions which correlate to stages of the tendering process set out in the 1988 Act (although the contracts covered extend beyond the ambit of the CCT legislation), the fourth paragraph does not do so, although, like the other paragraphs, it does relate to proposed, not concluded,

¹⁷ S17(4)(b)(ii)

¹⁸ S17(4)(b)(iii)

contracts. Section 17(4)(b)(iv) lists "giving or withholding approval for, or the selecting or nominating, persons to be sub-contractors" as one of the functions regulated by S17. Thus, if an authority has reference to a non-commercial matter in the course of giving or withholding approval for a person to be a sub-contractor, or in selecting or nominating a person to be a sub-contractor, it will violate the S17(1) prohibition. It should be noted, however, that nothing in S17 precludes an authority nominating, selecting, giving, or withholding approval for a person to be a sub-contractor by applying other criteria relating to a potential sub contractor's technical ability or financial standing. Thus approval may be withheld from a sub-contractor if it has been adjudged to be technically incapable of performing the work which a contractor wishes to sub-contract to it.

The third set of functions listed in S17(4) relate to matters which occur after a contract has been awarded. The first function listed as falling within the ambit of the S17(1) prohibition is identical to the last listed in relation to proposed contracts: giving or withholding approval for a person to be a sub-contractor, or selecting or nominating a person to be a sub-contractor¹⁹. The only difference between this provision and that discussed immediately above is that this provision precludes non-commercial matters being taken into account when selecting, nominating, giving or withholding approval for a person to be a sub-contractor where a contract has been awarded, whereas the earlier provision related to proposed contracts. However, it must once again be emphasised that S17 does not prohibit selecting, nominating, giving or withholding approval from a sub-contractor, but only prohibits non-commercial considerations being referred to in the course of doing so. As before, a decision based on an assessment of the sub-contractor's technical ability and financial standing would be valid. The second function listed as being subject to the general prohibition is the termination of contracts²⁰. It is thus impermissible to have reference to non-commercial considerations either in the course of reaching the

¹⁹ S17(4)(c)(i)

²⁰ S17(4)(c)(ii)

decision to terminate a contract, or as one of the reasons for terminating a contract.

However, the provisions of S17 are not simply limited to taking into account certain matters relating to contractors, as is evident from S17(7):

"Where any matter referable to a contractor would ... be a non-commercial matter in relation to him, the corresponding matter referable to-

- (a) a supplier or customer of the contractor;
 - (b) a sub-contractor or his supplier or customer;
 - (c) an associated body of the contractor or his supplier or customer;
 - (d) a sub-contractor of an associated body of the contractor or his supplier or customer;
- is also, in relation to the contractor, a non-commercial matter for the purposes of this section."

This provision extends the application of the prohibition to matters not directly referable to a contractor. By declaring that the matters which represent non-commercial considerations in relation to contractors will also be non-commercial matters in relation to the various persons listed in this subsection, the effect of the regime is greatly extended, and the possibility that the S17 regime may be circumvented is greatly reduced. This provision precludes an authority, for example, from excluding a potential contractor from an approved list, or from withholding an invitation to tender not by having reference to a non-commercial matter regarding the potential contractor, but instead by referring to a non-commercial matter regarding that potential contractor's suppliers, other customers, associated bodies²¹ and so on²². Thus an authority cannot take into account the activities of the various persons listed in S17(7), to the extent that they fall within non-commercial matters, as a determining factor in its relationships with contractors. What, however, are the non-commercial matters which must not be referred to?

²¹ As defined by the Companies Act 1985: S17(8)

²² Cf. *R v Lewisham LBC ex parte Shell UK Ltd.* [1988] 1 All ER 938

THE NON-COMMERCIAL CONSIDERATIONS

Section 17(5) lists eight matters which are non-commercial matters in relation to proposed or subsisting contracts for the supply of goods or services or the execution of works for the purposes of the general prohibition contained in S17(1). Some are of greater significance than others. Each will now be examined in turn.

(a) Terms and conditions of employment

Section 17(5)(a) defines as a non-commercial matter:

"The terms and conditions of employment by contractors of their workers or of the composition of, the arrangements for the promotion, transfer or training of or the other opportunities afforded to, their workforces"

This is perhaps the most significant of the matters defined as non-commercial considerations, as it raises a number of important issues. As a result of these matters being declared to be non-commercial considerations an authority will ostensibly be contravening the prohibition contained in S17(1) if it refers itself to such matters as the terms and conditions of a contractor's workforce, the composition of a contractor's workforce, the contractor's promotion system, questions relating to the transfer of workers, and the training of and "other opportunities afforded to" the workforce, a term which would encompass such matters as holiday and sick pay. The reference to the terms and conditions of the contractor's workforce is a generalisation, with the other matters listed here representing specific cases. The phrase "terms and conditions of the workforce" ensures that in theory any matter regarding the basis on which persons are employed cannot be referred to by an authority in the course of its relationships with contractors or potential contractors. However, not all references to legislation regarding the terms and conditions of employment are prohibited:

"... I should stress that I do not ... intend to hold that a local authority is not to include in its contracts provisions requiring the contractor to comply with the general law. It is only to the extent that there are specific obligations so included which cover such

matters as pay, hours of work, what a particular employee is or is not permitted to do and so on that there would be an infringement."²³

However, a closer examination of several of the specific elements listed in S17(5)(a) raises questions about their validity. Four matters merit further examination: the composition of the workforce, the arrangements for promotion, the transfer of the workforce, and the training received by employees. The first two can be considered together.

The composition of the workforce, and the arrangements for promotion of employees can be considered together because the most obvious reason why a local authority would wish to concern itself with these matters is to ensure that the legislation regarding sexual and racial discrimination is complied with. In relation to race relations matters, S18 of the 1988 Act does allow local authorities to have regard to their duty under S71 of the Race Relations Act 1976 to eliminate unlawful racial discrimination and promote equality of opportunity and racial harmony by asking questions seeking information or undertakings as to workforce matters, and by including in a draft contract or tender document provisions relating to workforce matters²⁴. However, this exception does not extend to terminating a contract and all questions must be put to potential contractors in written form²⁵: the Secretary of State may specify the questions which a local authority may ask²⁶. This exception is therefore of limited utility. Race relations matters fare rather better than sex discrimination, however: a local authority cannot require compliance with the Sex Discrimination Act 1975²⁷. Thus, while it is permissible for an authority to draw a contractor's attention to race and sex discrimination legislation, and to require observance of the general law, it cannot require compliance with specific legal measures which impinge on the terms and conditions

²³ *R v London Borough of Islington ex p. Building Employers' Confederation* [1989] IRLR 382 per Parker LJ at para 43

²⁴ S18(1), (2)

²⁵ S18(3)

²⁶ S18(5)

²⁷ *R v London Borough of Islington ex p. Building Employers' Confederation*, *supra*.

of employment. It has been suggested that the DoE may modify its position on the race relation provisions of the 1988 Act in the belief that this aspect of the non-commercial considerations regime is inconsistent with the provisions of the EC public procurement Directives²⁸. To an extent this position is supported by two judgements of the European Court of Justice. The first²⁹ held that it is possible as a matter of domestic law to take into account other policy aims in the award of contracts provided that the provisions of the Directives have also been complied with, the secondary policy aim being pursued is consistent with the wider principles of Community law and the Treaty in particular, and the awarding authority has publicised its use. It is therefore highly unlikely that the provisions of Part II of the 1988 Act are precluded by EC law. However, the fact that the ECJ has held that one of the factors governing the acceptability of secondary policies is their legality in national law³⁰, means that it is ostensibly open to the UK government to regulate reference to other policy aims in the procurement process as they have done in Part II of the 1988 Act, and to extend the non-commercial considerations regime as it sees fit. The second case, *Commission v Italy*³¹ conflicts with *Beentjes* to the extent that it states that an authority may only have reference to the criteria for exclusion of tenderers set forth in the Community's public procurement directives³²: as the government considers that compliance with employment protection legislation does not impinge upon a contractor's competence, probity, technical ability or financial standing, this case undoubtedly supplies some support for its position.

However, where the Services Directive applies, there is another provision which bears directly upon the validity of S17 to the extent that it precludes the terms and conditions of employment being

²⁸ See e.g. DoE issues new guide for CCT race relations clauses 4-10/3/94 MJ 11

²⁹ *Gebroeders Beentjes BV v The Netherlands*, Case 31/87, [1988] ECR 4635, [1990] 3 CMLR 239

³⁰ See paragraph 20

³¹ Case C-360/89, 3/6/92, unreported

³² The decision in this case is arguably devalued by the ECJ's failure to consider its earlier decision in *Beentjes* when issuing its judgement

referred to in the course of awarding a contract. Article 28, one of the common rules on participation, provides that:

"1. The contracting authority *may* state in the contract documents ... the authority or authorities from which a tenderer may obtain the *appropriate information* on the *obligations* relating to the *employment protection provisions and the working conditions* which are in force in the Member State, region or locality in which the services are to be performed and which shall be applicable ... during the performance of the contract.

2. The contracting authority which supplies the information referred to in paragraph 1 shall request the tenderers ... to indicate that they have taken account, when drawing up their tender, of the obligations relating to employment protection provisions and the working conditions which are in force where the [contract] is to be carried out. This shall be without prejudice to the application of the provisions ... concerning the examination of abnormally low tenders" (emphasis added)³³

The Services Directive, where it applies, thus endows an authority with the discretion to direct a potential contractor to the "authority or authorities" which may provide information on the obligations relating to employment protection and working conditions in the Member State, region or locality. Until its abolition this would ordinarily have been the Department of Employment: it is presently unclear whether this function will be performed by the Department of Education and Employment or the DTI. However, what is the "appropriate information"? This term is not defined, but as the "information" supplied to potential contractors must relate to the *obligations* regarding employment protection provisions and working conditions it should be a comprehensive list of the legislative provisions which impose a duty on employers concerning these issues: a vague reference to the compliance with the "general law"³⁴ would not suffice, as contractors must receive information as to their various legal obligations, not a general reference to the existence of a body of law. However, as the information to be given may relate to the contractors' obligations in the Member State, region or locality this raises the possibility that the authority awarding a contract may be one of the authorities from whom a

³³ The equivalent provision in the Works Directive, Directive 93/37, is Article 23. There is no equivalent provision in the Supplies Directive, 93/36

³⁴ See Parker LJ, *R v Islington LBC ex p. Building Employers' Confederation*, *supra*, at para 43

contractor may obtain the "appropriate information". Indeed, if central government was to prove reluctant to provide such information, it would be prudent of the authority to do so.

Once the authority has exercised its power to direct a potential contractor to the body from whom information on its obligations may be obtained, it is then under a duty to request potential contractors to indicate that they have taken into account the obligations regarding employment protection provisions and working conditions when preparing their tender. The Directive is silent on what happens when a potential contractor refuses to give such an undertaking, although, presumably such a refusal may merit exclusion. It would certainly appear that a failure to take the relevant legislation into account may permit the authority to exclude potential contractors as, once notified of the employment protection provisions, an undertaking to comply with them would appear to become a material condition of participation in the award procedure, or the authority may invoke the procedure regarding abnormally low tenders. What, however, happens, where a potential contractor has a poor record of compliance with employment protection legislation? Certainly, this is not per se a ground for exclusion from participation in an award procedure, as it would appear that this may only happen where a contractor refuses to give an undertaking regarding compliance. However, where a contractor indicates that it has taken account of the relevant employment protection legislation in preparing its tender, surely it is prudent to assess the sincerity of that undertaking by referring to its past record of compliance? Moreover, the possibility arises that where a potential contractor has a consistently poor record of compliance with the relevant employment protection legislation, the disregard for his statutory obligations may constitute "grave professional misconduct" in accordance with Article 29(d) and permit the authority to exclude the contractor from participation in the award procedure. Thus, insofar as the non-commercial considerations regime excludes local authorities from referring to matters pertaining to the terms and conditions of employment, and the composition of the workforce and the arrangements for promotion, it is inconsistent with the provisions of the Services Directive, which,

where applicable, permits authorities to refer to the obligations regarding employment protection and working conditions, which will obviously include sex and race discrimination legislation.

Similar considerations apply to the second matter contained in S17(5)(a) which provides cause for concern: the fact that matters relating to the transfer of workers are non-commercial matters. This is a voluminous subject in its own right and sadly cannot be considered at the considerable length which it merits³⁵. The relevant legislation is the Acquired Rights Directive³⁶, as implemented by the Transfer of Undertakings (Protection of Employment) Regulations 1981³⁷, which is designed to ensure that where an undertaking is transferred its employees shall continue to observe the same terms and conditions for at least one year³⁸. Problems have arisen as to the UK's position on the circumstances in which an undertaking is transferred: until amended by the S33 of the Trade Union Reform and Employment Rights Act 1993 the TUPE regulations provided that an undertaking could be any trade or business, but not an entity which was "not in the nature of a commercial venture", thus, it was contended, precluding the application of the Regulations to situations where public sector work was transferred from the public to the private sector. However, it has become apparent that such a limitation is unjustified and that the Acquired Rights Directive does in principle apply to contracting out, and in circumstances which involve a non-commercial venture³⁹. A transfer for the purposes of the Directive will take place whenever the economic entity being transferred retains its identity⁴⁰, but the person responsible for carrying on the activity in question changes⁴¹. All the circumstances of the case

³⁵ See for a fuller explanation Napier; CCT, Market Testing and Employment Rights: The Effects of TUPE and the Acquired Rights Directive, Institute of Employment Rights, 1993

³⁶ Directive 77/187

³⁷ 1981 S.I. 1794, as amended by the Trade Union Reform and Employment Rights Act 1993, S33

³⁸ See e.g. Article 3(2)

³⁹ See Dr. Sophie Redmond *Stichting v Bartols and Others*, case C-29/91, [1992] IRLR 366; *Rask v ISS Kantineservice*, Case C-209/81, [1993] IRLR 133

⁴⁰ *Spijkers v Benedik*, Case 24/85, [1986] ECR 1119 at 1128

⁴¹ *Ny Mølle Kro*, Case 287/86, [1989] 2 CMLR 468 at 478; *Berg and Besselsen*, Cases 144 and 145/87, [1988] ECR 2559, at 2583

must be considered in order to evaluate whether a transfer has taken place: the nature of the undertaking, whether tangible assets have been transferred, the value of the undertaking's intangible assets, whether the majority of employees are taken on by the new employer, whether customers have been transferred, the degree of similarity between pre- and post-transfer activities, and whether the activities were suspended at any point⁴². Many of these criteria are relevant to CCT exercises: the customer and the work to be performed will certainly be identical if work is contracted out, and it is obvious from a perusal of the Guidance on anti-competitive practices that the other matters identified as being relevant by the E.C.J. do play a significant part in the tendering process⁴³. It is thus highly likely that the TUPE Regulations will apply if local authority work is contracted out as a result of CCT. Consequently, the relevant legislation is one of the obligations relating to protection of employment and working conditions, and any attempt to prevent an authority having reference to it in the course of an award procedure is inconsistent with the Services Directive and impermissible.

The Government, however, has recently issued advice to local authority chief executives in England regarding the pensions provided to staff transferred as a result of CCT which appears to contradict S17. This advice, which is expressly stated not to be guidance for the purposes of S9 of the Local Government Act 1992, states:

"As regards section 17 of the 1988 Local Government Act , the Department's view is as follows. Where there is a transfer of an undertaking to which TUPE applies, and where an authority had concluded that it should require the contractor to offer comparable pensions ... those matters are commercial matters which the authority is not precluded from considering as part of the procurement process. ...In requiring the provision of comparable pensions an authority is acting to protect itself from claims of unfair dismissal ... This is clearly a commercial matter rather than a non-commercial matter..."⁴⁴

⁴² *Spijkers v Benedik*, Case 24/85, [1986] ECR 1119 at pp1128-9

⁴³ See DoE Circular 10/93, Welsh Office Circular 40/93, Scottish Office Environment Department 13/93, discussed at length in Chapter 3, *supra*

⁴⁴ Text of letter reproduced in: DoE latest on pensions and TUPE 31 March-6 April 1995 MJ 20

This advice in many ways illustrates the unreality of the Government's position in relation to the applicability of TUPE and the provisions of the 1988 Act. First, it illustrates that the DoE at least believes that it can issue pronouncements on the application of TUPE which will be unswervingly accepted by both authorities and contractors. Secondly, the DoE has misdirected itself in law as to the import of the non-commercial considerations regime. Section 17(5)(a) states that the "terms and conditions of employment by contractors ... or the other opportunities afforded to, their workforces" will be a non-commercial consideration: irrespective of what the DoE may think, the pensions provided by contractors clearly fall within either the terms and conditions of employment or, alternatively, the "other opportunities afforded" and local authorities will be prohibited from taking this matter into account. Third, this advice ignores the fact that, unlike the tendering regime contained in Part I of the 1988 Act, the non-commercial considerations regime contained in Part II does not make provision for the enforcement of its provisions by the Secretary of State. Had it done so, the DoE's pronouncement that it would not consider this matter to be a non-commercial consideration would be of some significance. However, the scheme of Part II of the 1988 Act envisages that the duties it establishes will be enforced by aggrieved contractors in court proceedings⁴⁵. It is thus for the court to decide on a construction of S17(5)(a) what the ambit of the non-commercial considerations regime is: given the wording of the provision it is highly improbable that a court would concur with the DoE's position. In view of this fact the views expressed by the DoE are of no consequence, and the objections to S17(5)(a) expressed above are unaffected.

The final aspect of S17(5)(a) which is the fact that the training of employees is a non-commercial consideration. Certainly, the training given to a contractor's workforce in future may legitimately be a non-commercial consideration. However, the training of a potential contractor's employees in the past is an important factor in assessing technical ability. The Services Directive provides that:

⁴⁵ See below for a discussion of the enforcement procedures

"The ability of service providers to perform services may be evaluated in particular with regard to their skills, efficiency, experience and reliability"⁴⁶

Moreover evidence of a potential contractor's ability may be assessed by evidence relating to the contractor's "educational and professional qualifications and/or those of the firm's managerial staff and, in particular, those of the person or person's responsible" for the contract's performance⁴⁷ may be taken into account in assessing a potential contractor's technical ability. The educational and professional qualifications of the contractor and his staff inevitably relates to the training of the contractor's workforce. Thus, where the Services Directive applies, it is impermissible to restrict an authority's ability to take into consideration the training of the contractor's workforce as this is an important element of assessing technical ability in the course of a contract award procedure.

(b) The contractor/sub-contractor relationship

Section 17(5)(b) defines as a non-commercial matter:

"whether the terms on which contractors contract with their sub-contractors constitute, in the case of contracts with individuals, contracts for the provision by them as self-employed persons of their services only."

This provision effectively precludes local authorities from referring to the basis of the relationship between contractors and sub-contractors if the authority's intention is to establish whether the contractor is maintaining a workforce, or is refraining from engaging employees, and instead is only prepared to enter into a relationship with an individual on the basis that they are self-employed, and thus technically a sub-contractor. This provision is therefore intended to complement S17(5)(a). While S17(5)(a) is intended to preclude reference to a contractor's relationship with individuals as employees, this provision is intended to preclude reference to a contractor's relationship with individuals as sub-contractors. However, the form of the relationship addressed here is

⁴⁶ Directive 92/50, Article 32(1)

⁴⁷ Directive 92/50, Article 32(2)(a)

significant. As this provision relates to individuals as sub-contractors rather than employees, the provisions of the Services Directive most relevant to terms and conditions of employment⁴⁸ cannot be relied upon. However, the Services Directive permits a tenderer to indicate the share of the contract which may be sub-contracted to third parties⁴⁹. To that extent, authorities may concern themselves with the relationship between contractor and sub-contractor. Moreover, while it would appear that a contractor may not be excluded from an award procedure on the basis that it does not possess the necessary technical skills, provided that it can show that it has access to those skills⁵⁰, the Services Directive, where it applies in its entirety, permits an authority to assess the technical ability of potential contractors by taking into account the contractor's average annual manpower over the previous three years⁵¹ and the proportion of the contract which the contractor intends to sub-contract⁵². If a potential contractor wished to engage individuals as sub-contractors rather than employees, this may be indicated by a low average manpower and an unusually high proportion of the contract being sub-contracted. As the local authority is permitted to set the level of technical expertise which it finds acceptable⁵³, it may therefore exclude contractors from participation in the contract which engage an unacceptably high proportion of sub-contracted labour. However, while these are the criteria which impact most directly upon decisions to exclude contractors because they engage individuals as sub-contractors rather than employees, there are others which would have an indirect impact. For example, a potential contractor may be required to indicate the "technicians ... involved, whether or not belonging to the service provider"⁵⁴: this may be easily ascertained if a contractor uses its own employees, or those of another company to which it sub-contracts the work, but where individuals are engaged as sub-

⁴⁸ Directive 92/50, Article 28

⁴⁹ Directive 92/50, Article 25

⁵⁰ See Directive 92/50, Article 26; *Ballast Nedam Groep NV v Belgische Staat*, Case C-389/92

⁵¹ Article 32(2)(d)

⁵² Directive 92/50, Article 32(2)(h)

⁵³ See e.g. *Gebroeders Beentjes BV v The Netherlands* [1988] ECR 4635; [1990] 1 CMLR 287

⁵⁴ Article 32(c)

contractors rather than employees, those individuals will generally only be engaged after the contract has been awarded, and the contractor will be unable to give an indication of who will be involved.

(c) Government policy

A contractor's involvement with "irrelevant fields of Government policy" is defined as a non-commercial matter by S17(5)(c). The contractor's involvement may take the form of "business activities and interests", which means that the extent to which the field of Government policy relates to the contractor carrying on his business may not be referred to. The phrase "irrelevant fields of Government policy" is defined in S17(8):

" 'Government policy' falls within 'irrelevant fields' for the purposes of this section if it concerns matters of defence or foreign or Commonwealth policy..."

Thus an authority will refer to an irrelevant field of Government policy, if it refers in essence to defence or foreign policy and the extent to which contractors [or those bodies listed in S17(7)] have supplied goods or services, or executed works for "any person or authority" executing defence or foreign relations functions⁵⁵. This provision is consistent with EC law: taking into account these matters in the award of a contract could not be characterised as awarding a contract in accordance with objective criteria. Moreover, it should be noted that, at common law, taking into account a contractor's involvement with other areas of Government policy can probably be successfully challenged on the ground of manifest unreasonableness⁵⁶ or improper purpose⁵⁷.

(d) Contractors and industrial disputes.

Section 17(5)(d) defines as a non-commercial matter:

⁵⁵ S17(8)

⁵⁶ *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 233; *Wheeler v Leicester City Council* [1985] 1 AC 1054

⁵⁷ *R v Lewisham LBC ex parte Shell UK Ltd* [1988] 1 All ER 938

"the conduct of contractors or workers in industrial disputes between them or any involvement of the business activities of contractors in industrial disputes with other persons"

In effect what is prohibited here is not only reference to a contractor or potential contractor's own industrial relations record, but also its involvement in the industrial disputes of others, the most obvious example being the situation where a contractor's employees have been used to perform the work of striking workers elsewhere in an attempt to break a strike. While the latter may well constitute an irrelevant consideration at common law, many would contend that a contractor's industrial relations with its own workforce are relevant, as poor industrial relations may affect the ability of a contractor to perform work satisfactorily. While the Services Directive does not permit a potential contractor's industrial relations record to be taken into account in assessing technical ability, it does permit authorities to investigate the extent to which potential contractors have satisfactorily performed similar work in the recent past, and to seek references from former clients⁵⁸: it may be that poor industrial relations have had an adverse effect on the performance of previous contracts, and may thus be reflected in the references of previous clients. Therefore, while a contractor or potential contractor's industrial relations record may validly be included in the list of non-commercial considerations, the effect of poor industrial relations may be evident in the manner in which previous contracts have been performed, a matter which may validly be referred to by authorities.

(e) Territorial origin

The fifth non-commercial matter is:

"the country or territory of origin of supplies to, or the location in any country or territory of the business activities or interests of, contractors"⁵⁹

⁵⁸ Directive 92/50, Article 32(2)(b);

⁵⁹ S17(5)(e)

This provision effectively prohibits several things from being taken into account, especially as the phrase "country or territory of origin" is so wide as to encompass any geographical area. First, an authority is prohibited from having reference to the place of origin of supplies used by contractors or potential contractors in the course of performing a contract. Secondly, and most obviously, it prohibits an authority from taking into account the country of origin of the contractor or potential contractor. Finally, it ensures that it is impermissible to take into account the location of any activity related to the pursuit of a contractor or potential contractor's business. This provision is consistent with the general principles of EC law, which prevents discrimination on the grounds of nationality where a contractor originates in a member state⁶⁰, and prevents any measure which may have the effect of restricting the free movement of goods between Member States⁶¹. However, this provision goes further than the Provisions of the EEC Treaty, by relating not only to Member States, but to any country or territory.

(f) Irrelevant affiliations

Section 17(5)(f) defines as a non-commercial matter:

"any political, industrial, or sectarian affiliations or interests of contractors or their directors, partners or employees"

What will constitute "political, industrial or sectarian affiliations or interests" is defined in S17(8) as meaning:

"actual or potential membership of, or actual or potential support for, respectively, any political party, any employers' association or trade union or any society, fraternity or association"

Section 17(5)(f) thus casts a wide net. First, it will be a contravention of the general prohibition on referring to non-commercial matters to refer to the affiliations and "interests" not

⁶⁰ EEC Treaty, Article 6

⁶¹ Ibid., Article 30; see also *Du Pont de Nemours Italiana SpA v Unita Sanitaria Locale No.2 Di Carrara*, Case 21/88, [1990] ECR 889, [1991] 3 CMLR 25

only of contractors, their directors, and partners, but also employees. As one of the matters defined as an industrial affiliation is actual or potential membership of a trade union, this prevents an authority from having reference to whether a contractor or potential contractor recognises trade unions. Secondly, it is the actual or potential membership or support for a variety of bodies by any of the persons listed above which cannot be referred to. Membership or support for a political party, for example, involves some positive action, and is thus easily ascertained, but potential membership, or, more particularly, potential support is a much more vague notion: anyone can potentially support a political party. Third the range of bodies to which this prohibition relates are potentially limitless: political parties, employers' associations, and trade unions can be fairly easily identified as such, but this provision also extends to "any society, fraternity, or other association", which is very vague and presents almost limitless possibilities. There are problems inherent in almost every category, however: "political party" includes not only the mainstream political parties, but also those of extreme values such as the BNP; "employers' association" may include any number of ephemeral, single issue, pressure groups; and "society, fraternity or other association" would most obviously include the freemasons, and the support or membership of pressure groups. While most of the matters prescribed as non-commercial considerations in this provision are legitimately included as such, there is one serious flaw in the matters proscribed as non-commercial by S17(5)(f). As this provision effectively declares that an authority cannot refer to the membership of an employers' association or any society or association by a contractor, its directors, partners or employees, a significant problem arises. In relation to some services it will be necessary to require that a contractor is a member of a professional body: the most obvious examples are legal services and accountancy, where membership of a professional association is mandatory. Yet, as a matter of national law, reference to membership of any society or association is technically prohibited. This, however, is inconsistent with the Services and Works Directives, which provide that an authority may require potential contractors to show evidence of membership of the

relevant professional body⁶². Thus, to the extent that S17 prohibits local authorities from ascertaining that contractors are members of a relevant professional body, it cannot survive scrutiny against the standards set by the Services and Works Directives.

(g) Support for certain bodies

The penultimate non-commercial matter is:

"financial support or lack of financial support by contractors for any institution to or from which the authority gives or withholds support"

The aim of this provision is to prevent an authority taking into account a contractor, or potential contractor's financial support, or lack of it, for an institution which it does or does not support, or to prevent an authority from attempting to pressurise such persons to give support to, or withdraw it from, institutions. The most obvious "institution" is a political party, in which the most likely scenario is either inviting a person to submit a tender because of their support for a political party, or conversely, withholding an invitation to tender for similar reasons. However, the "institution" in question could also be a charity, for example.

(h) Use of technical services.

The final matter prescribed as being a non-commercial consideration is:

"use or non-use by contractors of technical or professional services provided by the authority under the Building Act 1984 or the Building (Scotland) Act 1959"

This provision essentially prevents the authority from requiring that a contractor or potential contractor should avail itself of services provided by the authority in the course of performing certain work. To require in the course of an award procedure that contractors do so would represent a restriction on the free movement of services

⁶² Directive 92/50, Article 30; Directive 93/37, Article 25

by requiring use of local services, and thus represent a contravention of Article 59 of the EEC Treaty⁶³

The list of non-commercial matters contained in S17 is extensive, but perhaps not exhaustive. Consequently the Secretary of State may, by statutory instrument, extend the list of non-commercial considerations⁶⁴, which includes the power to extend the list of other persons to whom non-commercial considerations are referable contained in S17(7), amend any definition contained in S17(8)⁶⁵, and orders may include such consequential or transitional provisions as the Secretary of State deems necessary or expedient⁶⁶. Drafts of any order exercising these powers must be laid before, and be approved by a resolution of, each House of Parliament⁶⁷. None has as yet been made.

In view of the nature of many of the matters listed as non-commercial considerations in S17, the non-commercial considerations regime would have its effectiveness reduced if authorities had not been placed under a duty to give reasons for their decisions. This was imposed by S20

THE DUTY TO GIVE REASONS

The duty to give reasons for decisions is contained in S20(1) of the 1988 Act:

"Where a public authority exercises a function regulated by section 17 above by making, in relation to any person, a decision to which this section applies, it shall be the duty of the authority forthwith to notify that person of the decision and, if that person so requests in writing within that period of 15 days beginning with the date of the notice, to furnish him with a written statement of the reasons for the decision."

⁶³ See e.g. *Commission v Italy (re Data Processing)*, Case C-3/88, [1989] ECR 4035, [1991] 2 CMLR 115

⁶⁴ S19(1)

⁶⁵ S19(2)

⁶⁶ S19(3)

⁶⁷ S19(4)

The first thing which S20 does is to impose a duty on an authority exercising many of the functions listed in S17(4) to notify "forthwith" the person affected by the authority's decision if it also relates to a decision to which S20 applies. The decisions to which S20 applies are listed in S20(2):

"This section applies to the following decisions in relation to any person, namely-

- (a) in relation to an approved list, a decision to exclude him from the list,
- (b) in relation to a proposed public supply or works contract-
 - (i) where he asked to be invited to tender for the contract, a decision not to invite him to tender,
 - (ii) a decision not to accept the submission by him of a tender for the contract,
 - (iii) where he has submitted a tender for the contract, a decision not to enter into the contract with him, or
 - (iv) a decision to withhold approval for, or to select or nominate, persons to be sub-contractors for the purposes of the contract, or
- (c) in relation to a subsisting public supply or works contract with him-
 - (i) a decision to withhold approval for, or to select or nominate, persons to be sub-contractors for the purposes of the contract, or
 - (ii) a decision to terminate the contract."

The list of functions contained in S20(2) is similar in many respects to those contained in S17(4), but differs in two vital respects. First, it does not divide approved lists into two sub-categories as S17(4)(a) does. Secondly, unlike the list contained in S17(4), the functions listed in S20(2) are couched solely in a negative manner: they only deal with some form of exclusion from the contractual process. This provision sensibly acknowledges that a potential contractor, for example, is not likely to want to know the reason why he has been included in a contract award procedure, while a potential contractor who has been excluded is more likely to want to know the reason for his exclusion, and in the case of a concluded contract, a contractor will wish to know why it has been terminated. However, this does create an anomaly: while S20 requires that a person excluded from the contractual process should be informed of an authority's decision "forthwith", there is no duty placed on authorities to inform those not excluded from the contractual process promptly, although given the timing of the various stages of

CCT exercises it is inevitable that they will be. However, what must be emphasised is that this element of S20 only places a duty on authorities to inform any person affected of a decision to exclude them from the contractual process: it does not impose a duty to give reasons for that exclusion.

The second element to S20(1) does impose such a duty, however. When a person excluded from the contractual process by an authority, has been informed of that fact, he may request written reasons for his exclusion within 15 days of the notice of his exclusion being issued. The authority in question is then placed under a duty to give reasons to that person, and must send a written statement to him within 15 days of receiving his request⁶⁸. The Secretary of State may amend the period during which an excluded person may request reasons, and the period during which reasons must be dispatched⁶⁹. His capacity to alter the period during which an authority must provide reasons for its decision is restricted by the Services Directives, which, where it applies, states that an eliminated potential contractor must be informed of the reasons for his exclusion within 15 days of the receipt of his request⁷⁰. Moreover, S20(3), is at present at variance with the Directive: the former requires authorities to issue reasons within 15 days of the "date of the request", while the latter requires reasons to be given "within 15 days of the date on which the request is received".

What, however, must be the content of the statement of reasons which must be given on request? This matter was addressed by Lord MacLean in the case of *C and E Campleman v Clydesdale DC*⁷¹:

"It is not in doubt that the 'written statement' in terms of section 20(1) of the 1988 Act must provide proper and adequate reasons which deal with the matters in issue in an intelligible way. It must leave the informed reader in no real and substantial doubt what the reasons were and the material considerations taken into account in reaching the decision. ... Consistently with what I have just said ... the purpose of section 20 is to

⁶⁸ S20(3)

⁶⁹ S20(4), (5)

⁷⁰ Directive 92/50, Article 12(1)

⁷¹ Outer House, 15 May 1992 (unreported)

ascertain whether a decision in relation to section 17(4) has proceeded on a proper basis and not simply whether in reaching it the local authority took into account non-commercial matters."

The reasons given must, therefore, be proper and adequate, leaving the informed reader in no doubt as to what the authority's reasons for excluding a person from the contractual process, and the factual and legal basis for the reasons, were. To this end it becomes apparent that a statement to the effect that no non-commercial matters were referred to will not suffice: the purpose of S20 is to ascertain whether a decision regarding the functions in S17(4), or, more to the point the decisions listed in S20(2), have been taken on a proper basis, which in relation to CCT will mean not only without reference to non-commercial matters, but also without acting anti-competitively. Section 20 therefore provides an important means of scrutinising the legal validity of an authority's actions. However, it is unclear what will happen when an authority fails to comply with its duty. The only case in which an authority failed to give reasons, *R v Enfield London Borough ex p. T. F. Unwin (Roydon) Ltd*⁷², occurred in peculiar circumstances, the authority not wishing to give reasons in order not to prejudice a criminal investigation. The court felt that, even if there had been a breach of the S20 duty, this was cured by the reasons given by one of the authority's officers in his affidavit, and thus no remedy was necessary⁷³.

Having examined the content of the duty to give reasons, it now remains to consider what action an aggrieved contractor may take following their receipt.

AVAILABLE LEGAL REMEDIES FOR BREACH OF S17

The legal remedies available to parties prejudiced by a breach of S17 are enumerated in S19. Section 19(7) provides that the duty contained in S17(1) does not create a criminal offence. However, S19(7)(a) declares that in any action for judicial review a number of persons shall have sufficient interest (in England and Wales), or

⁷² [1989] 1 Admin.LR 50

⁷³ per Glidewell LJ at p 58B

sufficient title and interest (in Scotland). The first is a potential contractor. The second is a former potential contractor, in relation to a contract which has been awarded. Finally, a body representing a group of contractors is entitled to bring an action for judicial review of a breach of S17(1). The obvious omission from this list is a potential sub-contractor, or former potential sub-contractor: as the terms in S19 have the same meaning as those contained in S17⁷⁴, a contractor or potential contractor is "in relation to functions as respects a proposed public supply or works contract, any person who is or seeks to be included in the group of persons from whom tenders are invited or who seeks to submit a tender for or enter into the proposed contract"⁷⁵. As a sub-contractor does not seek to be invited to tender, submit a tender, or to enter into a contract with the authority, he cannot therefore be included in the list of persons declared to have a right to seek judicial review by virtue of S19(7)(a), although a trade association could raise the issue on his behalf.

A sub-contractor would, however, appear to be one of the persons who could take advantage of S19(7)(b), which declares:

"a failure to comply with [S17(1)] is actionable by a person who, in consequence, suffers loss or damage"

Any person suffering loss or damage as a result of a decision violating the S17(1) prohibition is therefore entitled to raise an action against the offending authority. As S19(7)(b) refers to "a person" who suffers loss or damage, this provision would not only appear to encompass contractors and potential contractors, but also sub-contractors and the suppliers of contractors. However, the attractiveness of such actions may be reduced by S19(8):

"In any action under section 17(1)...by a person who has submitted a tender for a proposed public supply or works contract arising out of the exercise of functions in relation to the proposed contract the damages shall be limited to damages in respect of expenditure reasonably incurred by him for the purpose of submitting the tender."

⁷⁴ S19(12)

⁷⁵ S17(8)

Thus the damages awarded to potential contractors availing themselves of S19(7)(b) are limited to the amount "reasonably incurred" in the course of submitting a tender. As sub-contractors and suppliers have a contractual relationship with the potential contractor, it is inconceivable that their loss or damage may be greater than his.

The final provision of S19 which relates to legal remedies is S19(9):

"Nothing in section 17 above or subsection (1) above implies that the exercise of any function regulated by that section may not be impugned; in proceedings for judicial review, on the ground that it was exercised by reference to other matters than those which are non-commercial matters for the purposes of that section."

In essence this provision declares that neither S17 nor S19 prevents a person who is entitled to do so from seeking judicial review of the exercise of one of the functions listed in S17(4) on the grounds that an authority's actions have offended against the general principles of administrative law, such as reasonableness⁷⁶ or irrelevant considerations, as opposed to relying on one of the non-commercial considerations listed in S17(5).

CONCLUSIONS

Part II of the 1988 Act follows a logical progression: it establishes the regime which prevents authorities from taking into account certain matters which are deemed to be non-commercial, establishes a duty to give reasons which should reveal the basis on which a wide range of decisions are taken, and finally contains provisions regarding the remedies available to those apparently affected by a decision to take into account non-commercial matters. In some respects this regime complements the Secretary of State's powers regarding anti-competitive conduct: both are police powers, the former allowing aggrieved contractors to take action when authorities take certain matters into account, the latter permitting the Secretary of State to penalise authorities for doing so. There is

⁷⁶ See e.g. *Wheeler v Leicester City Council* [1985] 1 AC 1054

even one major point of similarity between the subject matter, as both represent attempts to exclude the application of TUPE. Like the anti-competitive conduct provisions, the non-commercial considerations regime contains a number of serious flaws, and conflicts with the EC public procurement regime on a number of issues, thus providing further evidence of a failure on the part of the UK Government to ensure that the provisions of national legislation are consistent with its obligations under EC law.

The non-commercial considerations regime is of considerable importance to tendering exercises conducted under Part I of the Local Government Act 1988. There is considerable identity between the functions regulated by the non-commercial considerations regime and the stages of the tendering process prescribed by Part I. Thus authorities must take care not to refer to non-commercial considerations in reaching decisions as to which potential contractors who have expressed an interest in being awarded work should be invited to submit a tender, whether to accept or reject a tender, and in reaching a decision as to the award of the contract. However, perhaps of more relevance to the conduct of tendering exercises is the duty placed on local authorities to inform potential contractors of decisions taken during the conduct of tendering procedures which affect them, and to give reasons for their decisions promptly when requested to do so by contractors. The significance of this measure is that it will enable contractors to find out not only whether non-commercial considerations have been taken into account in the course of a decision which affects them, but also to find out whether the decision affecting them has been taken in accordance with the provisions of the tendering regime prescribed by the 1988 and 1992 Act, or the requirements of the EC public procurement regime. Contractors could subsequently use such information to form the basis of a complaint to the Secretary of State, or to found the basis of court proceedings

CHAPTER 7 A PUBLIC LAW OF CONTRACT?

Shortly after the passage of the Local Government Act 1988 a learned commentator observed that:

"English law ... has no special system of rules governing contracts made by public authorities. Formerly the Crown had a special legal position, and to some extent it still has; but ... it has for most practical purposes been put into the same position as an ordinary litigant by the Crown Proceedings Act 1947. ... Other governmental bodies such as local authorities are subject to the ordinary law of contract which applies to them in the same way as to private individuals and corporations. They are, as also are government departments, restricted in certain ways by rules of administrative law ... But there is no special body of law governing their contracts other than that which governs contracts generally."¹

This statement would apply equally to the United Kingdom's other constituent jurisdictions. However, this view, apparently having its roots in Dicey's conception of the rule of law², can be criticised at two levels. First, some express the view that the ordinary law of contract has only a limited role to play where government contracts are concerned³, and that:

"...the general law of contract, in short, is only one of the elements, and not necessarily the most significant, by which the conduct of the parties to a government contract is regulated"⁴

The contractual might of governmental institutions in particular can act as a distorting factor on the contractual relationship, especially where a governmental institution wishes to use this aspect of its dominium power⁵ to pursue a policy objective. Thus the application of

¹ Wade, *Administrative Law*, 6th Edition (1988), pp 787-8. See also Wade and Forsyth, *Administrative Law*, 7th Edition (1994), which repeats this statement at p801

² See Dicey, *Law of the Constitution*, 10th Edition, Chapter 4

³ See Craig, *Administrative Law*, 3rd Edition, pp 696-7

⁴ Turpin, *Government Procurement and Contracts*, (1989), pp 104-5

⁵ See Daintith, *The Executive Power Today: Bargaining and Economic Control*, in Jowell and Oliver, *The Changing Constitution*, 2nd Edition; also Daintith, *The Techniques of Government in The Changing Constitution*, 3rd Edition. The term "dominium power" broadly relates to a governmental institution's economic

the general law of contract may only be of secondary importance: the contract is only a means to an end, not an end in itself, and its terms will reflect the relative economic position of the parties, and the policy objective which the governmental institution wishes to pursue.

Secondly, while one may question whether the general law of contract is the most important factor on the contractual relationship because of the dominant economic position, and bargaining position, of governmental bodies, one may also question whether the assertion that there is "no special system of rules governing contracts made by public authorities" is any longer a valid one. In other words: do we now have a public law of contract? We must remember that Wade's statement related not merely to central government, but also to local authorities. Therefore, before examining the development of a wider framework of regulation of public sector contracts, the extent to which the legislation imposing compulsory competitive tendering evidences such a development will be considered.

THE RELEVANCE OF THE LOCAL GOVERNMENT, PLANNING AND LAND ACT 1980, AND THE 1988 AND 1992 ACTS

It is in Parts I and II of the Local Government Act 1988, its predecessor, Part III of the Local Government, Planning and Land Act 1980 (which imposes CCT for construction and maintenance work⁶), and in sections 8 to 11 of the Local Government Act 1992 that we can most clearly see the emergence of a "special body of law" governing the contracts of public authorities. The various provisions of these statutes represent a comprehensive attempt to regulate every element of the contractual process.

While Part III of the 1980 Act, Part I of the 1988 Act, and SS8 to 11 of the 1992 Act ostensibly only regulate the situation where a local authority seeks to award the right to perform certain activities to its DSO, two things must not be forgotten. First, the legislation

might as a means of pursuing policy objectives by making financial disbursements, e.g. making grants, entering contracts

⁶ For a brief discussion see Part I chapter 1

establishes the client/contractor split⁷, thus ensuring that in the course of a compulsory competitive tendering exercise an authority's client side is effectively separated from the contractor side, the DSO. Secondly, as a result of the client/contractor split, and the other elements of the anti-competitive practices regime⁸, supported by the Secretary of State's police powers contained in S19A and S19B of the 1980 Act, and SS13 and 14 of the 1988 Act ensure that a DSO is placed in the same position as other tenderers and enjoys no special privileges in the course of an award procedure. Thus, although the legislation only applies at present to a limited range of activities, and only where the DSO is involved in the tendering process, it does promulgate a set of provisions which regulate the award of local authority contracts and establish conditions precedent to the formation of agreements between authorities and DSO's. However, it must be remembered that the Secretary of State may extend the application of CCT by using his powers under S2(3) of the 1988 Act, thus increasing the significance of these provisions.

The nature of the provisions contained in the 1980, 1988 and 1992 Acts is what is important for the purposes of this discussion. The tendering provisions establish a set of rules regulating the basis on which local authorities award, and can enter into contracts relating to certain activities. Indeed, the provisions of the 1988 and 1992 Acts are such that it is possible for the Secretary of State to tailor the tendering regime for a particular service⁹. In the light of this situation, it can no longer be maintained that, as regards local authorities, there is no "special body of law" regarding their contractual relationships: where the CCT legislation applies the circumstances in which a local authority awards a contract are the subject of a considerable body of regulation, and, as the range of services subject to CCT expands, the impact, and significance of that body of law consequently increases.

⁷ See the Local Government (Direct Services Organisations) (Competition) Regulations 1993 S.I. 848, Regulation 4

⁸ See 1980 Act S9(4)(aaaa), 1988 Act S7(7), 1992 Act S9, Local Government (Direct Services Organisations) (Competition) Regulations 1993 S.I. 848, DoE Circular 10/93, Scottish Office Environment Department Circular 13/93, Welsh Office Circular 40/93, Chapters 3 and 4, *supra*

⁹ See e.g. S2(9), S7, S8, S15(5), S15(6) of the 1988 Act, S8(5)(b), S9(4)(b) of the 1992 Act

The emergence of a body of law relating to the contracts of local authorities is further emphasised by the contents of Part II of the Local Government Act 1988. Whereas Part III of the 1980 Act, Part I of the 1988 Act, and SS8 to 11 of the 1992 Act only regulate the basis on which contracts are awarded and entered into, Part II is not so limited. While there is a considerable correlation between the activities regulated by the non-commercial considerations regime and the various stages of the tendering procedures required by the CCT legislation¹⁰, Part II of the 1988 applies to all local authority contracts, irrespective of their subject matter or financial value. Moreover, every conceivable stage of the contractual process is regulated, from the compilation of lists of approved contractors¹¹, to the various elements of a tendering procedure¹², the contents of the contract¹³, and the termination of the contract¹⁴. However, while every aspect of the contractual process is regulated, and all local authority contracts are subject to this regime, one cannot ignore the fact that S17 of the 1988 Act only prohibits non-commercial considerations from being referred to, and thus regulates the contractual process in a negative manner. Two points must be noted in relation to this. First, it is probably easier to regulate a complex contractual process by identifying what is prohibited, rather than what is permitted. Secondly, the list of non-commercial considerations contained in S17(5) is extensive, but not exhaustive, and it is not inconceivable that the Secretary of State will define other matters as non-commercial considerations at some point in the future¹⁵. Therefore, just as there is the potential for further regulation of the contractual activities of local authorities by the extension and refinement of the CCT legislation's regimes, so too there is the potential for all local authority contracts to be further regulated by the extension of the definition of what may be a non-commercial consideration.

¹⁰ See S17(4) of the 1988 Act, and Chapter 5, *supra*.

¹¹ S17(4)(a)

¹² S17(4)(b)

¹³ S19(10)(b)

¹⁴ S17(4)(c)(ii)

¹⁵ S19(1)

In addition, in Scotland and Wales, by virtue of S57 of the Local Government (Scotland) Act 1994 and S25 of the Local Government (Wales) Act 1994, the ability of local authorities to contract with each other for the provision of services is defined, and the circumstances in which authorities may enter into such contracts is subject to periodic regulation by the Secretary of State¹⁶.

It can therefore be said that the traditional position that there is no special body of law regulating the contracts of local authorities, and that they are subject to the ordinary law of contract can no longer be maintained. Certainly, the ordinary law of contract continues to play a not insignificant part in evaluating a local authority's contractual activities: for example, the principle which allows one to characterise the relationship between a local authority and its DSO resulting from a tendering process conducted under the CCT legislation as a contract, at least as far as third parties are concerned, is drawn from the ordinary law of contract¹⁷. However, it is obvious that rules specifically designed to regulate the various elements of the contractual process are becoming increasingly important in relation to the contractual relationships of local authorities, with the CCT regimes contained in the 1980 and 1988 Act establishing conditions precedent to the establishment of contractual relationships between local authorities and DSOs, while Part II of the 1988 Act regulates everything up to the point of termination of the contract. There is by no means a *developed* set of rules regulating the contractual relationships of local authorities. However, there is a *developing* body of such rules. Indeed the body of rules relating to local authority contracts, while it may not have reached its final stage of development, is clearly at quite an advanced stage of development, and will continue to develop for some time, particularly by the expansion of the range of activities subject to CCT, and the refinement of the anti-competitive practices regime, which is arguably the most important factor in determining the basis on which a contract award is made under the CCT legislation. The body of rules specifically relating to local authority contracts will thus continue

¹⁶ See Chapter 1 for a fuller discussion

¹⁷ See *Bremer Handelsgesellschaft m.b.H v Toepfer* [1980] 2 Lloyd's LR 43, discussed in Chapter 1, *supra*

to expand, and in many cases will supplant the ordinary law of contract. However, as the nature of the legislation regarding CCT is generally negative, in that it usually defines what is prohibited, as opposed to what is permitted, it is unlikely that the general law of contract will ever be totally replaced¹⁸, although its significance has been, and will continue to be, reduced.

The emergence of a series of special rules establishing conditions precedent to the formation of contracts and their termination is not, however, a process limited to local authorities. Parallel developments can also be detected in the NHS and central government, and these must be briefly examined in order that the trend towards a public law of contract may be traced more effectively.

DEVELOPMENTS IN THE NHS AND CENTRAL GOVERNMENT

As has been noted above¹⁹ the use of market-based techniques is a process which has not been confined to local government, but which also encompasses central government and the NHS. While both have been subject to extensive market testing programmes, the approach adopted with regard to the NHS is particularly intriguing²⁰.

In 1983 Circular 19/83 signified the introduction of a market testing programme for ancillary services across the NHS. Competitive tendering for, and the contracting out of, services thus has a fairly lengthy history within the NHS, and the commitment to market testing was reaffirmed in the *Competing for Quality* White Paper²¹. However, alongside the impetus to involve the private sector in the performance of certain services, it has also been recognised that the private sector may not be either prepared or able to provide other

¹⁸ It is noteworthy that while the various provisions of the 1980, 1988 and 1992 Acts regulate contracts for the supply of goods and services, and performance of works, contracts for the acquisition of heritable property, for example, do not fall within their ambit

¹⁹ See Part I chapter 5

²⁰ See generally on this issue Harden, *The Contracting State* pp 14-7, Chapter 5; Allen, *Contracts in the National Health Service Internal Market* [1995] 58 MLR 321

²¹ See *Competing for Quality*, Cm 1730, chapter 4

services: the concept of managed competition within the NHS was therefore introduced by the National Health Service and Community Care Act 1990. The 1990 Act provided by virtue of S4(1) that:

"In this Act the expression 'NHS contract' means an arrangement under which one health service body ' means an arrangement under which one health service body ('the acquirer') arranges for the provision to it by another health service body ('the provider') of goods or services which it requires for the purposes of its functions."

Parallels can be drawn between this provision and S57 of the Local Government (Scotland) Act 1994 and S25 of the Local Government (Wales) Act 1994²²: firstly, all three are intended to regulate agreements between statutory bodies for the provision of goods and services, and secondly, as a result of this, the influence of S4(1)'s terminology upon the drafting of S57(1) and S25(1) is obvious. However, an examination of S4(3) reveals how distinct the agreements envisaged by the 1990 Act are from those which local authorities may enter into with each other in Scotland and Wales:

"Whether or not an arrangement which constitutes an NHS contract would, apart from this subsection, be a contract in law, it shall not be regarded for any purpose as giving rise to contractual rights or liabilities, but if any dispute arises with respect to such an arrangement, either party may refer it to the Secretary of State for determination ..."

The effect of S4(3) is to declare that while the agreements encompassed by S4 may draw much from the concept and terminology of contract, they shall not be a contract in law, irrespective of any rule of law which would imply that such agreements are contracts²³. In essence what the 1990 Act puts in place is a non-contractual agreement, which is nevertheless intended to be binding as between the parties involved, and in relation to which the Secretary of State possesses considerable powers in effect to impose an agreement upon the health service bodies involved²⁴.

²² See Chapter 2 for a discussion

²³ Given the organisational structure put in place by the 1990 Act it is highly probable that, apart from S4(3), the agreements set out in S4(1) would fall within the ambit of *Bremer Handelsgesellschaft m.b. H v Toepfer* [1980]2 Lloyd's L.R. 43, and constitute contracts, at least as regards third parties

²⁴ See S4(3)-(8)

The agreements encompassed by S4 are therefore *sui generis*. Unlike agreements between local authorities pursuant to S57 of the Local Government (Scotland) Act 1994 and S25 of the Local Government (Wales) Act 1994, for example, they are not binding contracts, do not give rise to any contractual rights or liabilities, and are not subject to the jurisdiction of the courts, although the exercise of the various powers entrusted to the Secretary of State by S4(3) to S4(8) may well be subject to review. However, while the statute may deprive these agreements of contractual status as a matter of law, it simultaneously puts in place a curious and intriguing legal regime to regulate those agreements. The clear aim of S4 is to ensure that the agreements reached between health service bodies are binding upon, and respected by, the parties involved. While the agreements themselves may not be subject to the jurisdiction of the courts, the Act sets in place its own dispute resolution procedure. This is a most interesting element of the regime regarding NHS contracts. In the traditional contractual model, parties are free to agree the terms and conditions of a contract with whoever they wish, even this may reflect the relative economic inequality of the parties, and, if a dispute subsequently arises between the parties to the contract, the issue may be referred to the court for resolution. In relation to NHS contracts, however, a different approach is taken. Instead of permitting an agreement to be entered into and then allowing a dispute to arise subsequently, S4 recognises that a dispute may be more likely to arise prior to an agreement being entered into, as a result of the relative economic positions of the parties (although this itself will largely be the result of the Secretary of State's allocation of resources), and consequently focuses attention on reaching, or more correctly imposing, a viable agreement. This approach is unique, and even though the agreements in question are specified not to be contractual, it does signify the emergence of a body of rules specifically tailored to regulating the formation of agreements by public authorities.

While the Government has sought to regulate the contractual relationships of local authorities in a variety of different ways, and to establish a regime regarding the formation of agreements between different health service bodies, one of the peculiarities of the

imposition of market-based techniques across the public sector is the general absence of legislation regarding central government. With the exception of Part II of the Deregulation and Contracting Out Act 1994, which, amongst other things, regulates the circumstances in which the functions of Ministers may be contracted out, there is no domestic legislation specifically regulating the process of central government market testing, or establishing conditions precedent to the formation of contracts for the procurement of goods and services by the Crown. This may be explained by the fact that successive Governments have chosen to reform the structure and working practices of the departments of central government by using their prerogative and common law powers, rather than by statute. However, while Parliament may not have enacted legislation regulating the market testing programme, that is not to say that central government procurement is unregulated: the EC procurement regime will have an impact upon the activities of central government, as well as those of local authorities and the NHS.

THE RELEVANCE OF THE EC PUBLIC PROCUREMENT DIRECTIVES

The EC Public Procurement Directives, although they establish the standards by which many elements of the 1980, 1988 and 1992 Acts must be evaluated, actually go much further. The Services²⁵, Supplies²⁶ and Works²⁷ Directives apply not only to local authorities but also almost any conceivable governmental body or public authority²⁸, and consequently the contract award procedures of public authorities in general must conform to the standards contained therein. The directives form yet another, and perhaps the most important, conditions precedent to the award and formation of contracts by public authorities. As has been noted above, this has severe ramifications for several critical elements of the CCT regimes²⁹. However, we cannot ignore the wider ramifications of the principles of EC law on the procurement activities of all public authorities.

²⁵ Directive 92/50

²⁶ Directive 93/36

²⁷ Directive 93/37

²⁸ See Article 1(b) of each Directive.

²⁹ See Chapters 1, 2, 3, 4, 5, *supra*

It must be appreciated that the Services, Supplies and Works Directives are not the only source of the rules relating to the award of contracts by public authorities. The EC Treaty is also of great importance. As a consequence of the Treaty provisions a public authority is, for example, prevented from reserving a proportion of a contract to contractors in a particular locality³⁰. Procurement procedures must not, therefore, simply conform to the provisions of the Directives. However, the Directives are perhaps the single most important, and perhaps the most visible, element of the EC procurement rules. The Directives pursue three objectives: Community wide advertisement, common technical specifications, and greater transparency of award procedures. Consequently, each Directive not only defines the parties to the contract, and the subject matter and minimum value of the contracts falling within its ambit, but also deals with a variety of other matters which are of importance. Principal among these are the rules relating to the technical specifications for the work exposed to competition, the rules regarding the advertisement of award procedures in the Official Journal of the European Communities, the publication of award notices, and, perhaps most crucially, each Directive establishes the parameters for the conduct of the award process. Thus, the content of the open, restricted, and negotiated procedures, and the circumstances in which each may be used, is set forth. In addition, the Directives set out the common rules on which potential contractors may participate in an award process, establish the criteria for qualitative selection which may be used to exclude unsuitable contractors, and set the parameters of the criteria which may be used in awarding contracts. Finally, both the Services and Works Directives establish a procedure for the extension of a contract in limited circumstances.

The Public Procurement Directives represent a substantial body of law which public authorities must comply with in the award of a wide variety of contracts. Each has been implemented in the United

³⁰ See Article 30, *Du Pont de Nemours Italiana SpA v Unita Sanitaria Locale No. 2 Di Carrara*, Case C-21/88 [1990] ECR 889, [1991] 3 CMLR 25; Articles 52, 59, *Commission v Italy (Re Data Processing)*, Case C-3/88, [1989] ECR 4035, [1991] 2 CMLR 115

Kingdom by means of delegated legislation³¹. Such is the nature of the Directives that it is arguable that what will constitute a contract for their purposes is a Community law concept³², something which emphasises their impact on national law: if so, where one of the Directives applies it will not be the concept of a contract set out in national law which is predominant, but that contained in Community law. This emphasises the fact that the general law of contract is being increasingly supplanted by a body of law relating specifically to the contracts of public authorities, and that European legislation is playing what is perhaps the predominant role in this process. However, it must be remembered that European legislation does not only set out substantive rules regarding the award of contracts by public authorities: it also provides the minimum requirements for the procedures which must be available to those who have a grievance regarding the conduct of an award procedure³³.

The EC public procurement regime thus covers a comprehensive range of issues, from the parties to, and subject matter of, a contract, to the procedures regulating its award, the limited circumstances in which contracts may be awarded, and the procedures regarding the expression of grievances relating to award procedures. While the EC regime does extend to a greater range of public bodies, and contracts, than the regime established by the 1980, 1988 and 1992 Acts, it is almost exclusively concerned with the award of contracts. Unlike Part II of the 1988 Act, for example, it is not concerned with the content of actual terms of contracts, or with the circumstances of their termination. Perhaps the EC procurement regime's concentration on award procedures as opposed to issues such as the circumstances in which the contracts of public authorities may be terminated, or the terms which may be included in such contracts, is its main limitation, and one which will hopefully be addressed in time. However, one cannot ignore two vital facts. First, by virtue of the principle of supremacy of Community law, it is the EC public procurement regime which establishes the minimum standards which the conduct of contract award procedures by public authorities must

³¹ Public Supplies Contracts Regulations 1995 S.I. 201; Public Works Contracts Regulations 1991 S.I. 2680; Public Services Contracts Regulation 1993 S.I. 3228

³² See Chapter 1, *supra*

³³ See Directive 89/665

conform to, and not national law. Secondly, one must bear in mind that hitherto the most concerted attempt at a domestic level to regulate the procurement activities of public authorities is the regulation of local authority activities contained in the 1980, 1988 and 1992 Acts: there has been no legislative initiative which attempts to regulate any aspect of the contractual activities of other public authorities and, in particular, central government. The only body of law which does so is that relating to the award of contracts arising from the EC public procurement regime and its implementation in national law³⁴. Consequently, whenever central government, or an NHS trust engages in a market testing exercise in regard to a service, or wishes to enter into a supply contract, or to enter into a contract for the construction or maintenance of a building, while there may be no domestic statute prescribing the award procedure which must be complied with, the requirements imposed by the procurement Directives must be complied with whenever the necessary thresholds are exceeded, and there is an identity of subject matter.

CONCLUSION

It cannot be maintained any longer that there is no special body of laws relating to the contracts of public authorities. The 1980, 1988, and 1992 Acts mark a clear departure from the position that it is the ordinary law of contract which governs the contracts of public authorities. The three statutes in question, taken as a whole, establish a substantial body of law regulating every element of the contractual process: they establish procedures which must be complied with prior to the formation of a contract in specific circumstances, and regulate the terms and conditions which may be included in local authority contracts, as well as the circumstances in which they may be terminated. However, the 1980, 1988 and 1992 Acts only regulate the contractual relationships of local authorities.

Apart from S4 of the National Health Service and Community Care Act 1990, there is no domestic legislation relating specifically to the contractual relationships of other public authorities. However, S4 of the 1990 Act is a unique and significant provision: it marks a

³⁴ See fn. 23

departure from the traditional model of contractual relations. It establishes a legal regime peculiar to agreements between distinct health service bodies. The agreements in question are not to be contracts in law, or justiciable by the courts, but would appear intended to be formal and no less binding on the parties to them, and are subject to a dispute resolution procedure which, curiously, operates prior to formation of the agreement, not after its formation. While NHS contracts are declared not to give rise to contractual rights and liabilities, one cannot ignore that S4 of the 1990 Act nevertheless establishes a legal regime which regulates the formation of an important set of the agreements of public authorities. One criticism of the regime established by the 1990 Act, however, is that it focuses on the formation of contracts, and the content of the agreements, primarily because the intention of S4 is to ensure that a set of conditions agreeable to both parties is achieved, rather than the termination of such contracts, for example.

While the body of domestic rules regulating the various stages of the contractual process may have emerged on an ad hoc basis, and while there is no body of legislation relating specifically to the contracts of central government, the EC public procurement regime applies to all public authorities. Thus it is not only the provisions of the 1980, 1988 and 1992 Acts which must be evaluated against the standards set by the procurement Directives: the Directives also set the minimum standards to which the procurement activities of other public authorities must conform. It is the EC public procurement regime which provides the only body of legislation regulating the procurement activities of, most significantly, central government.

Neither the EC public procurement regime, nor the domestic regulation of local authority contracts can, however, be characterised as being fully developed bodies of law. Both have flaws, particularly in relation to the circumstances in which they apply. The EC public procurement Directives are limited by the fact that they only regulate the award of contracts, and not other aspects of the contractual process such as the termination of contracts, and by the two-tier

application of the Services Directive³⁵. At a domestic level, it should be noted that, although Part II of the 1988 Act regulates every aspect of the contractual process, the CCT provisions contained in the 1980, 1988 and 1992 Acts as yet apply to relatively few local government activities, although it is obvious that the scope of the legislation will continue to expand for the foreseeable future³⁶. Moreover, the refinement of the tendering provisions, and particularly the anti-competitive practices regime will be an ongoing process. In refining and framing domestic legislation, more attention will have to be paid to the provisions of the EC public procurement regime. This illustrates a particularly important development: the increasing importance of developments in European law in shaping developments in our constitutional and administrative law³⁷. Developments at the European level may well be of greater importance than those at a domestic level in the foreseeable future in the development of a coherent body of law aimed at regulating the contractual activities of public authorities.

At present, however, it is safe to say that we do now have an emerging body of special rules regulating various element of the contractual processes of public authorities. While this body of law may be substantial, particularly in relation to the contracts of local authorities, it may be characterised as a developing, rather than a fully developed set of rules governing the contracts of public authorities. The fact that this is still a developing body of law is emphasised by the fact that, both at domestic and European level, most emphasis is, at present, placed on establishing conditions precedent to the formation of a contract: with the exception of S17 of the Local Government Act 1988, no rules have, as yet been enacted regarding the termination of contracts. Moreover, although the general law of contract has been supplanted to a large degree by the development of a body of rules regarding the contractual relationships of public authorities, it is unlikely that it will ever be totally

³⁵ See Directive 92/50, Articles 8,9. The two tier application of the Directive must be reviewed by 1st July 1996, in accordance with Article 43

³⁶ See Chapter 1, *supra*

³⁷ See on this point Lord Scarman, *The Development of Administrative Law: Obstacles and Opportunities*, 1990 Public Law 490. One of the prime examples of this phenomenon in recent years is the case of *Factortame Ltd. v Secretary of State for Transport* [1991] 3 All ER 769

replaced, as is evidenced, for example, by the general absence of legislation regarding the termination of contracts, thus ensuring that such matters are conducted in accordance with the established common law principles.

It is, perhaps, the absence of a body of principles regarding the regulation of contracts after their formation which most markedly distinguishes the developing system of rules pertaining to the contracts of public authorities from the highly developed system of administrative contracts which some states possess. If we are to compare the principles governing administrative contracts in France³⁸ to those in Britain, what is noticeable is that French administrative law not only recognises special principles regarding the formation of contracts, which, like those discussed above in relation to Britain, will increasingly be shaped by the influence of the EC public procurement regime³⁹, but has also developed a set of principles to regulate the relationships between the parties to public sector contracts thereafter. Thus French administrative law recognises that contracts may be varied by public authorities due to a change in circumstances, and if the contractor fails to agree, may engage another party⁴⁰; the contractor must, however, be indemnified for the variation of the contract if it imposes more onerous duties upon him⁴¹. The right of a public authority to vary the contract would appear to be an inherent one, distinct from the terms of the contract: in Britain variation of the contract would only be permitted to the extent that it had been envisaged in the contract itself, and any attempt by a public authority to vary the contract beyond that would entitle the contractor to resile.

There are several other notable principles of French administrative law regarding the contracts of public authorities. Chief amongst these are *imprevision*, *fait du prince*, and *force*

³⁸ See generally on this issue Bell and Brown, *French Administrative Law* (4th Ed, 1992) at pp 192-200; Mitchell, *The Contracts of Public Authorities: a Comparative Study*, Chapter 4

³⁹ See e.g. Bell and Brown, *op.cit.* p195

⁴⁰ See e.g. *Compagnie Generale Des Eaux*, CE 12 May 1933; *Compagnie Nouvelle Du Gaz Deville-Les-Rouen*, CE 10 January 1902

⁴¹ *Compagnie Generale Des Eaux*, CE 12 May 1933

majeure. Imprevision is the principle that, where there is a fundamental change in circumstances after the formation of the contract which renders it uneconomical for the contractor to perform his duties, he will not be allowed to rescind the contract where the public interest demands that it should be performed, but may be compelled to perform it and be entitled to be indemnified by the public authority⁴². Once again, in Britain such a change in circumstances, unless envisaged in the contract, may justify its rescission. *Fait du prince* is the principle that a contractor may not claim an indemnity if his costs are increased, and profitability affected, by a governmental act of general application, but only if the act in question has a particular impact on the subject matter of the contract⁴³. *Force majeure* is the principle that where a change of circumstances has occurred which neither party can overcome and the object of the contract has been destroyed, the contractor may expect to be released from his obligations⁴⁴. The thrust of the principles of French administrative law regarding the contracts of public authorities is to attempt to ensure that a change of circumstances does not adversely affect the effective functioning of the public service by resulting in the rescission of the contract⁴⁵. Its object is the maintenance of the contract in the public interest, with the contractor being indemnified if necessary in proportion to the change in his duties:

"... it seems that the solution reached is to regard the contract as fixing an equation between the rights of the contractor and the administration, and provided that that equation is not disturbed adjustments are possible, and the extent of obligations or rights may be varied according to need."⁴⁶

An examination of the position in France illustrates the deficiencies of the law in the constituent jurisdictions of the United Kingdom: while it has undoubtedly undergone considerable development in

⁴² See e.g. *Compagnie Generale D'Eclairage De Bordeaux*, CE 30 March 1916

⁴³ See e.g. *Ville de Paris*, CE 14 February 1936. For a detailed discussion of this principle see Mitchell, *op.cit.* pp193-8

⁴⁴ See e.g. *Compagnie des Tramways de Cherbourg*, CE 9 December 1932

⁴⁵ See Mitchell, *op.cit.* at p182, pp 188-193. This is particularly evident in Mitchell's view in relation to the doctrine of *imprevision*

⁴⁶ Mitchell, *op.cit.* p218

recent years, it has concentrated on relatively few issues, and no attempt has been made at a domestic level to establish a coherent set of principles regarding the contracts of all public authorities. However, as Parts I and II of the Local Government Act 1988 illustrate, where the will exists to do so, Parliament has shown itself willing to regulate every conceivable aspect of the contracts of specific public authorities. There is no reason, therefore, why an attempt cannot be made to emulate the example of some of our European neighbours and establish a more wide-ranging and coherent set of principles regulating the contracts of all public authorities.

PART III
CHAPTER 1

CCT AND ACCOUNTABILITY

The Local Government Acts 1988 and 1992 do not merely put in place a system of regulating the competition process: they also contain provisions relating to the accountability of local authorities not only for the conduct of the competition process but also for the conduct of work by DSO's thereafter. However, it is not intended to limit this examination of the effect of CCT on local authority accountability to consideration of, for example, the provisions of the 1988 Act regarding DSO accounts. One must remember that the accountability of governmental bodies can be divided into three broad categories: legal accountability, financial accountability, and accountability through the political process. The legal accountability of local authorities for their conduct of the tendering process, particularly the vital issue of the Secretary of State's powers regarding anti-competitive conduct, and the rights of contractors who wish to pursue actions regarding irregularities in the award of contracts, have been dealt with extensively above¹, and consequently need not be considered in detail here. The effect of the 1988 and 1992 Acts upon the other two facets of accountability, namely financial and political accountability, does, however, merit more substantial attention.

In considering the effect of the 1988 and 1992 Acts upon financial and political accountability, the three sets of provisions relating most directly to these issues must be examined first. The first provisions to be examined are those contained in the 1988 Act regarding the maintenance of DSO accounts. The second, basically an extension of the duty to keep accounts, are the provisions relating to publication of annual reports. Finally, the public right of access to information under S12 Of the 1988 Act and S10 of the 1992 Act, will be considered.

¹See Part II Chapters 4, 5, 6

ACCOUNTABILITY WITHIN THE STATUTORY SCHEME

The duty to maintain accounts

The basic duty to keep DSO accounts is contained in S9 of the 1988 Act, which declares that:

"(1) This section applies where a defined authority carry out, in the financial year beginning in 1989 or in a subsequent financial year, work which falls within a defined activity and fulfils the condition that-

- (a) it is carried out under a works contract to which section 4 above applies, or
- (b) section 6 above applies to it

(2) For each financial year in which the work is carried out, the authority shall keep an account as regards all work which falls within that activity, is carried out by them in that year and fulfils that condition."

There is thus a duty to maintain accounts regarding defined activities² where the work in question is performed as functional work by virtue of S6, or under a works contract entered into pursuant to S4. However, as was illustrated above, as the result of recent legislation, works contracts can no longer exist in Scotland or Wales³, and, as it is highly likely that similar legislation will be enacted in England in the near future, it is not proposed to discuss the accounting provisions relating to contracts which would ostensibly fall within S4. However, as regards functional work (which will in future apparently encompass all work performed by DSOs)⁴, S9(2) clearly imposes a duty to maintain annual accounts for each particular defined activity which is performed by a DSO following compliance with the competition provisions of the 1988 Act. The content of accounts relating to functional work is further expanded upon by S9(4):

"Where any work falling within the activity is functional work, the authority shall enter, in the account kept under this section as regards the activity for the financial year in which the work is carried out, such item as is necessary to carry out any

² See Local Government Act 1988 S2, and Part II Chapter 1, *supra*

³ See Part II Chapter 2, the Local Government etc (Scotland) Act 1994, and the Local Government (Wales) Act 1994

⁴ See Part II, Chapter 2

intention expressed by the authority in relation to the work in any bid prepared under section 7(6) above."

The purpose of this provision is to ensure that the amount credited to a particular account should be no greater than the sum contained in, or ascertainable from, the DSO bid required by S7(6), and prepared in accordance with the provisions of S8(3) of the 1988 Act. Section 9(4) of the 1988 Act therefore effectively prohibits a local authority from crediting a DSO account with an amount in excess of that contained in the DSO's bid. It is interesting that S9 contains no provision which expressly permits the variation of the amount credited to a DSO account if there is a change in circumstances, although this does not mean that any variation of the amount to be credited to a DSO account is precluded. One must remember the central importance of the specification to the 1988 Act's tendering regime, and, in particular the duty imposed on DSOs to perform work in accordance with the specification⁵. Thus, if the specification envisages the possibility of variation in particular circumstances, with consequences for the amount paid to contractors, it will be possible to vary the amount credited to the DSO account, as the DSO bid should have been prepared in accordance with the specification.

The 1988 Act reserves certain powers to the Secretary of State regarding the content of DSO accounts. Section 9(5) provides that:

"The Secretary of State may specify-

(a) items which are to be entered in accounts kept under this section (in addition to items to be entered by virtue of subsections (3) ... above), and

(b) the method of determining the amount of any item to be entered by virtue of the specification."

This provision empowers the Secretary of State to specify the content of accounts. The Secretary of State may, first, specify items which must be included in accounts in addition to those required by S9(3), and, second, the method of calculating the amount of any item of account entered by virtue of the specification. It should be noted that the Secretary of State has the power to

⁵ S7(8)

"specify" these matters. These matters are not the subject of regulations, nor subject to Parliamentary scrutiny: the only requirement is that the specifications as to the content of DSO accounts should be made in writing⁶.

The exercise of the power to specify the method of calculating any item of account entered by virtue of the specification raises two interesting points. First, perhaps the most significant factor limiting the exercise of this power is that it relates to "any item to be entered by virtue of the specification". As the Secretary of State will use this power to determine the way in which items of account arising from the specification may be calculated, one is again drawn back to the central significance of the specification. Any item of account arising from the specification will depend on what the specification itself says. Of particular importance will be the nature of the service to which the specification relates, and the provisions of the contract relating to costing: each specification will contain its own provisions on the way in which a contract should be costed in order that bids may be evaluated, and subsequent variations made, on an objective basis. This may, however, vary from authority to authority and specification to specification. Thus, if the Secretary of State wishes to use the power contained in S9(5)(b) to specify the method of calculating items of account he is faced with two options, given that the items to be regulated must arise from the specification. First, he may choose a lowest common denominator approach, dealing with matters only at the most general level, and addressing those particular items which are common, or notorious, enough, to merit specific regulation. Secondly, he could specify the method of calculating items of account arising from the specification having first attempted to determine what form those matters should take in the specification. The Secretary of State could attempt to do this by exercising his powers regarding the definition of anti-competitive conduct to determine more closely the content of specifications. However, quite apart from any questions concerning the vires of such measures, more intense regulation of the specification may constrain the flexibility of the

⁶S15(4)

competition process, and deter competition. Therefore, the first course of action is perhaps the most acceptable to the Secretary.

The second point of interest regarding the exercise of the power to specify the method of calculating an item of account arising from the specification contained in S9(5)(b) is that there may be some tension between the exercise of this power and the provisions of S8(3) regarding the calculation of the DSO bid. While each relates to different points in time, with S8(3) relating to participation in the tendering process, and S9 to the performance of the work after it has been awarded to the DSO, the common element is the specification. Section 8(3) establishes the rules as to the costing of the DSO bid, and provides, for example, that:

"(c) in the case of an item to be credited [i.e. to a DSO account], the bid must state either what the authority intend as its maximum amount or the method by which they intend to calculate its maximum amount."

The Secretary of State may issue regulations regarding the DSO bid by virtue of S8(4). While it is only the DSO bid which must be prepared in accordance with S8(3), it impacts directly upon the way in which the future cost of work will be calculated: the DSO bid must state either the amount which will be charged for the work, or, more prudently, given the possibility of contract variation, especially in areas such as building cleaning, the method by which the cost of the work will be calculated. This is basically the calculation of the amount which will be credited to the DSO account. While the method of calculation contained in the DSO bid can only be regulated by statutory instrument⁷, however, S9(5)(b) permits the Secretary of State to specify in writing the method of calculating any item of account. Two possible points of tension thus exist between S8(3) and S9(5)(b): each may permit essentially the same calculation to be regulated in different ways, and, secondly, there is a tension between the method of regulation, as S8(3) may only be amended by virtue of statutory instrument, while the power contained in S9(5)(b) must be exercised by a specification, which falls outwith the ambit of the Statutory Instruments Act 1946.

⁷ S8(4)

Indeed the fact that specifications under S9(5) are not statutory instruments, and consequently are not subject to parliamentary scrutiny and need not be published, has, as will be seen below, its own implications for public scrutiny of DSO accounts.

The provisions outlined above only establish duties as to the maintenance and content of DSO accounts: these duties are insufficient in themselves to ensure scrutiny of DSO performance. It is only once one considers the duty to maintain accounts alongside, among other things, the duty to publish those accounts, that the accountability of DLOs and DSOs for their activities can be evaluated.

Duties pursuant to the maintenance of accounts.

The most obvious duty pursuant to the maintenance of accounts is that they should be published. Whether the level of accountability is commensurate with the degree of financial information which is available is a question which can be answered best after an examination of S10 and 11 of the 1988 Act.

Section 11 imposes duties as to the production and content of annual financial reports. It requires that, where a local authority carries out work falling within a defined activity pursuant to a works contract entered into under S4, or as functional work performed under S6 in the financial year 1989-90, or any subsequent financial year⁸, then, by virtue of S11(2) it:

"... shall prepare a report for the financial year concerned containing as regards all work which falls within that activity, is carried out by them in that year and fulfils the condition -

- (a) a summary of the account kept for that year under section 9 as regards the work,
- (b) a statement showing whether the requirement under section 10 above has been fulfilled for that year as regards the work,
- (c) a statement identifying such of the work (if any) as falls within the activity by virtue of a decision under section 2(5) above,

⁸ S11(1)

- (d) a statement identifying such of the work (if any) as falls within the activity by virtue of a decision under section 2(7) above, and
- (e) a statement identifying such of the work (if any) as is work to which section 6 above applies by virtue of a decision under section 6(4) above."

It is perhaps easier to explain the final three paragraphs of S11(2) before considering the import of S11(2)(a) and (b). Basically paragraphs (c), (d) and (e) require that, in certain circumstances, local authorities must include in their annual financial report statements as to the nature of the work performed by their DSO. Section 11(2)(c) relates to the power given to local authorities by S2(5) to decide which defined activity work should be treated as falling within where that work falls within two defined activities, and requires that, where an authority avails itself of this power, it must make a statement in its financial report identifying the work which is to be treated as falling within only one defined activity. In similar vein, where a local authority utilises its power under S2(7) to treat as falling within a defined activity work which is not required to be subject to CCT, it must, by virtue of S11(2)(d), make a statement in its financial report identifying the work which would not otherwise fall within the defined activity. The statement required by S11(2)(e) is more obscure, as it requires that authorities should identify work to which the functional work regime applies by virtue of a decision under S6(4). The obscurity of this provision lies in the fact that S6(4) relates to the regulations bringing CCT into effect, and effectively declares that the Secretary of State may issue regulations permitting work to be treated by local authorities as falling within a defined activity where it does not otherwise do so. No regulations have, as yet, been issued to this effect, and, given the scope of S2(5) and S2(7), it is difficult to envisage situations in which they would be issued.

The first two paragraphs of S11(2) are undoubtedly the most significant, as they relate solely to financial matters. The first, S11(2)(a), requires that a summary of the account kept under S9 must be prepared: effectively this means that an authority must prepare a summary of its DSO's accounts regarding each defined activity performed in any given financial year. Section 11(2)(a) is, therefore, the provision which actually requires the production of

financial reports for each defined activity. Such reports must "present fairly the financial result" of performing the defined activity in the financial year in which it was carried out, and be expressed in the form specified by the Secretary of State⁹. Authorities may also be required to include in reports such additional information as the Secretary of State may specify¹⁰. As with the other financial provisions, S11 of the 1988 Act favours the issue of specifications, which are not subject to Parliamentary scrutiny, to the issue of regulations by statutory instrument. The required financial reports must be prepared not later than 30th September (that is within six months of the end of the financial year to which they relate) and submitted to the authority's auditor by 31st October¹¹.

Although the second paragraph, S11(2)(b) blandly states that annual reports must include a statement indicating compliance with the duty imposed by S10 as regards the defined activity for the financial year in question, this provision requires the inclusion in the annual report of perhaps the single most important piece of information: the rate of return on capital employed. Section 10 imposes the duty on authorities to meet the financial objective specified by the Secretary of State, having reference to such factors as he fits fit¹², in relation to work performed pursuant to the 1988 Act's provisions in any financial year from 1989-90 onwards. The financial objective, is invariably a requirement to achieve a rate of return on capital employed. Thus the statement required by S11(2)(b) is essentially one indicating that the rate of return has, or has not, been achieved. When a financial report relating to a defined activity has been submitted by a local authority to its auditor in accordance with S11(7), the auditor must consider the statement concerning the rate of return and give his written opinion on the statement to the Secretary of State and the authority in question¹³.

⁹ S11(3)

¹⁰ S11(4), (5)

¹¹ S11(7)

¹² S10(4)

¹³ S11(8)

The interaction of the accounting regime of the 1988 Act with other means of financial scrutiny

The information provided via the accounting process and compliance with the duties regarding the financial objectives set by the Secretary of State is obviously of considerable importance to anyone attempting to evaluate the financial performance of DSOs and DLOs. Consequently, the various provisions contained in the accounting regime of the 1988 Act should provide considerable opportunities to those who wish to see that authorities should be fully accountable to the public for the activities of their DLOs and DSOs. However, one can question the extent to which the provisions of the 1988 Act increase public accountability for the financial performance of these bodies. Two questions must be answered. First, to whom are authorities accountable for their financial performance by virtue of the statutory scheme? Secondly, are there any adequate means of ensuring financial accountability for the performance of DLOs and DSOs extraneous to the 1988 Act?

The first question can be answered by examining the Secretary of State's enforcement powers. The statutory scheme seeks to redress failures to comply with the accounting system, and failures to meet the financial objective, via the procedures contained in S13 and S14 of the 1988 Act¹⁴. The statutory scheme thus renders local authorities accountable to the Secretary of State. Thus, if, in relation to defined activities performed under the 1988 Act's provisions, "it appears to the Secretary of State" that an authority has failed to maintain accounts in accordance with S9, prepare annual financial accounts in accordance with S11, or comply with the financial objectives set by virtue of S10, he may issue a notice for the purpose of obtaining information, and if the authority in question does not provide a satisfactory explanation, he may make one of the orders contained in S14. The legislative scheme thus emphasises that authorities are primarily answerable to the Secretary of State for the financial performance of their DSOs, and for compliance with the particulars of the statutory accounting regime. The list of matters which may be subject to investigation by

¹⁴ See Part II chapter 5 for an explanation of these provisions.

the Secretary of State under S13 is dominated by matters prescribed by the statutory financial and accounting regimes. The Secretary of State therefore has, by virtue of the 1988 Act, a general supervisory role of fundamental importance to monitoring the financial performance of DSOs and enjoys enforcement powers of a draconian nature: authorities are accountable to him for their financial performance, and seek to avoid the use of the S14 powers¹⁵. Indeed the 1988 Act recognises the Secretary of State as the most competent person to investigate the financial performance of authorities and take drastic courses of action.

While the 1988 Act ensures that the primary avenue of financial accountability is ostensibly via the Secretary of State, who holds the ability to bring the most severe sanctions to bear for failure to comply with the accounting provisions, this is not the only potential avenue of accountability regarding the financial performance of DSOs. One must ask to whom else local authorities owe a duty of accountability for the financial performance of their in-house operations. The position of two players in the arena of financial accountability must be considered: the auditor and the public.

The part which the auditor plays in scrutinising the activities of DSOs can be ascertained by examining the provisions of the Local Government Finance Act 1982 (which relates to England and Wales), and the Local Government (Scotland) Act 1973. The provisions of these statutes are relatively similar. Basically an auditor must satisfy himself that accounts have been prepared in accordance with the appropriate statutory requirements and proper accounting practice¹⁶. In the course of performing his duties the auditor has the right to inspect not only the accounts of a local authority, but also all documents relating to the accounts, and to seek further explanation of any matter contained in the accounts or related documents¹⁷. To what extent do the auditor's powers of

¹⁵ The majority of S14 notices are now for failure to meet financial objectives. There are no recorded instances of S14 notices being used with regard to the other requirements of the accounting regimes

¹⁶ Local Government Finance Act 1982, S15; Local Government (Scotland) Act 1973, S99

¹⁷ 1982 Act, S16; 1973 Act, S16

investigation result in a local authority being held accountable for the activities of its DSO? The auditor has the power to examine a local authority's accounts and the documents relating thereto: thus he possesses the power to examine the accounts of DSOs, either on the basis that they form part of the accounts of the authority in general, or on the basis that payments to these local authority controlled bodies for work performed represents an item of account, and can thus be investigated by him. It must also be remembered that auditors are not merely empowered to examine the financial propriety of items of account, but also their legality¹⁸. It would therefore appear that the auditor, in addition to the Secretary of State, may investigate the matters listed in S13 of the 1988 Act. He may thus consider not only the legality of an award of work to a DSO, but also whether the relevant accounts have been maintained in the form prescribed by statute. The auditor, while he may be able to consider the same matters as the Secretary of State, cannot avail himself of the courses of action set out in S14: the decision as to which sanctions to invoke against a local authority whose expenditure is unlawful, or which fails to comply with good accounting practice ultimately lies with others¹⁹. However, while the auditor does not enjoy the same powers of sanction which the Secretary of State does, he also is not quite as constrained in the matters which he may investigate. While the Secretary of State can only exercise his default powers in relation to the matters identified in S13 of the 1988 Act, which relate essentially to the conduct of the tendering process, the maintenance and content of accounts, and the duty to perform work in accordance with the specification²⁰, the auditor's powers relate to any item of account. Consequently he possesses the ability to hold a local authority accountable for any item of expenditure made by, or any funds allocated to, its DSO: while the Secretary of State may only exercise his powers of sanction in relation to certain statutory defaults, the auditor exercises powers of a deeper, more investigative, nature, and should therefore provide a valuable avenue of accountability in relation to the activities of DSOs.

¹⁸ 1982 Act, S19; 1973 Act, S102

¹⁹ 1982 Act, SS19-20; 1973 Act, SS102-104

²⁰ This duty is contained in S7(8): see Part II chapter 2

The final issue to be examined in relation to the financial accountability of DSOs is the role which members of the public may play in the process. There are significant differences between the role which members of the public may play in scrutinising the performance of DSOs in England and Wales, and the corresponding role in Scotland. The position in the former jurisdiction will be dealt with first.

In England and Wales the circumstances in which an individual may become directly involved in the scrutiny of the financial affairs of local authorities are regulated by S17 of the Local Government Finance Act 1982. This establishes two tiers of public involvement. The first way in which the public may become involved is via the public right of inspection contained in S17(1):

"At each audit by an auditor under this part of this Act any persons interested may inspect the accounts to be audited and all books, deeds, contracts, bills, vouchers and receipts relating to them and make copies of all or any part of the accounts and those other documents."

There are several interesting points which should be noted about this right of access to information. First, it should be noted that the right of inspection only exists at "each audit by an auditor under this part of this Act". This places two limitations on the right of inspection. The first limitation is temporal: access to accounts and documents by virtue of this provision is only available when an auditor is conducting an audit. The second is of much more significance to those seeking to examine certain aspects of a DSO's accounts: the right of access only exists where the auditor is conducting his audit "under this part of this Act". While an auditor will be inspecting the accounts of a local authority and all of the bodies for which it is responsible, his responsibilities with regard to perhaps the most significant indicator relating to DSO performance, the rate of return on capital employed, are not established by the 1982 Act, but by the 1988 Act²¹. It would therefore appear arguable that access to important documents regarding DSO activities may be refused, because the auditor's

²¹ S11(8)

scrutiny of the performance of these bodies is extraneous to his duties under the 1982 Act. The other major point of note regarding the public right of access is that it is available to "any person interested", the relevant interest being either a financial or legal interest²², and thus being wide enough to encompass the fiduciary duty owed to council taxpayers, and the duties owed to tenderers by virtue of the 1988 Act's tendering regime, or the EC public procurement regime.

The second way in which the public may become involved in the scrutiny of the financial activities of local authorities is by making representations to the auditor about the content of accounts:

(2) At the request of a local government elector for any area to which those accounts relate, the auditor shall give the elector, or any representative of his, an opportunity to question the auditor about the accounts.

(3) Subject to subsection (4) below, any local government elector for any area to which those accounts relate, or any representative of his, may attend before the auditor and make objections-

(a) as to any matter in respect of which the auditor could take action under section 19 or 20 below; or

(b) as to any matter in respect of which the auditor could make a report under section 15(3) above"

A number of points are raised by these provisions. First, it should be noted that, while the right to inspection is open to "any person interested", the right to question an auditor about the content of accounts, or to object to the content of the accounts, is limited to a local government elector in the area to which the audit relates. Thus the number of members of the public who may appear before the auditor to object, or to question him, is potentially smaller than those who may inspect accounts and related documents. However, it must be borne in mind that any elector wishing to make an objection concerning a DSO's performance will often have to obtain information via the right of inspection given by S17(1): as was discussed above, the possibility exists that inspection may not always be available. Secondly, it should be noted that there are two

²² See *Marginson v Tildsley* (1903) 67 J.P. 226

distinct means by which local government electors may become involved in the auditor's deliberations. First, an elector may, by virtue of S17(2), seek to appear before the auditor and question him about the accounts: this obviously plays a potentially important role in the process of accountability as it permits the auditor to be questioned about the content of an authority's accounts, and his treatment of them. Alternatively the elector may avail himself of his right of objection under S17(3). By virtue of S17(3) an elector may object to any matter which appears unlawful²³, or may raise any matter which would appear, in the public interest, to require an urgent report²⁴. The latter provision is undoubtedly the more important: it would permit an elector to raise matters pertaining to the performance of a DSO, thus either bringing problems to the attention of the auditor, or focusing his attention on a particular problem. However, while this may in theory facilitate the involvement of members of the public in the process of financial accountability, an elector's ability to make submissions to an auditor may well be constrained by an initial inability to acquire the necessary documentary evidence, given that the system of scrutinising DSO performance does not rely on the 1982 Act for its validity.

In Scotland the circumstances in which members of the public may become directly involved in the scrutiny of local authority finances is prescribed by S101 of the Local Government (Scotland) Act 1973, which is couched in similar terms to S17 of the 1982 Act, and also provides "any person interested" with a right of inspection to the accounts and related documents: the problems which arise in relation to access to documents in England are thus generally replicated in Scotland. However, there is a significant difference in that, unlike S17 of the 1982 Act, S101 also gives "any person interested" the right to raise an objection before the auditor, thus enabling a potentially wider range of persons to raise an objection in Scotland than possess that right in England

²³ S17(3)(a)

²⁴ S17(3)(b)

It would therefore appear that, while both the Local Government Finance Act 1982, and the Local Government (Scotland) Act 1973 ostensibly permit members of the public to become involved in the process of accountability, these statutes ultimately fail to ensure that individuals play any realistic part in examining the performance of DSOs. The essence of the problem is that neither statute guarantees a full flow of information to members of the public. Consequently, those who wish to make representations to the auditor regarding the activities and performance of DSOs may be operating at a disadvantage.

However, there are certain provisions contained in the 1988 and 1992 Acts which ensure a public right of access to information. The effect of these provisions on the accountability process must now be examined.

Access to information under the 1988 and 1992 Acts

Both S12 of the Local Government Act 1988, and S10 of the Local Government Act 1992 provide a public right of access to information, thus placing in the public domain information which may be vital to scrutinising the performance of DSOs.

Section 12 of the 1988 Act creates a right of access to two sets of information. The first description of information to which there is a public right of access is set out in S12(1) and (2):

"(1) If a defined authority, having decided to carry out functional work to which section 6 above applies, are requested by a person to supply a statement falling within subsection (2) below, they shall supply such a statement to the person.

(2) A statement falling within this subsection is a written statement showing-

- (a) the authority's decision to carry out the work,
- (b) the financial provisions shown in each offer (if any) to carry out the work made in response to an invitation made under section 7(4) above, and
- (c) the financial provisions of the bid prepared under section 7(6) above in relation to the work."

The first thing to note about this provision is its scope: S12(1) only imposes a duty to reveal information regarding functional work performed pursuant to S6 of the 1988 Act. The statement which an authority must provide to any person requesting it must contain three important pieces of information: first, a statement relating the decision to award the work to a DSO²⁵; secondly, the financial provisions of any tenders submitted in reply to an invitation to tender made under S7(4)²⁶; finally, the financial provisions of the DSO bid submitted pursuant to S7(6). The information made available by S12(1) and (2) thus primarily relates not to the performance of the contract, but to its award. Moreover, the mandatory nature of this provision removes the possibility that the provisions of the Local Government (Access to Information) Act 1986 can be used to deny access to the financial information relating to in-house contracts performed under the 1988 Act.

The public availability of this information will allow members of the public to become involved in the accountability process in a number of ways. First, such information may reveal that an authority has awarded a contract to its DSO when it had not submitted the lowest tender, raising the possibility of anti-competitive practices, and thus permit members of the public to make representations to the Secretary of State that he should investigate the award of this contract using his S13 powers. Secondly, if it becomes apparent that a contract has not been awarded to the lowest bidder, this information may be used to make representations to the auditor under S17 of the Local Government Finance Act 1982, and S101 of the Local Government (Scotland) Act 1973. Thus it would appear that the access to information by virtue of S12(1) and (2) may cure many of the defects of the 1982 and 1973 Acts. Finally, a person may use this information to raise the matter with a local authority councillor, thus pursuing the matter via the political process. These courses reflect the three strands of accountability: legal, financial, and political. However, one must not lose sight of the limited nature of the information available by virtue of S12(1) and (2): as it essentially provides information regarding the financial provisions

²⁵ S12(2)(a)

²⁶ S12(2)(b)

of tenders submitted, it provides information concerning only one of the factors used in evaluating the relative merits of tenders. In order to use this information correctly, a party gaining access to it would have to possess not only considerable understanding of the provisions regarding the financial evaluation of tenders²⁷, but also an appreciation of the other factors taken into account in the course of tender evaluation. While such information may be of some use to an aggrieved contractor (who also has his own right of access to information under S20), few members of the general public will possess the necessary expertise to utilise this power effectively.

The second right of information created by S12 relates to reports for the financial year prepared in accordance with S11²⁸. By virtue of S12(4) any person may inspect the DSO's annual reports free of charge, while S12(5) provides that a local authority must supply a copy of the report to any person who requests it for a reasonable charge. Thus the information contained in the annual reports will be available to the public. This may make available a new range of information to those members of the public who wish to become involved in the process of accountability, but it is questionable whether the availability of such information actually increases accountability: copies of the annual reports must be dispatched to both the auditor and the Secretary of State, who will take action accordingly. This again emphasises that the principal avenues of accountability lie to the Secretary of State and the auditor, rather than to the public.

The final provision contained in the statutory scheme which merits consideration is S10 of the Local Government Act 1992:

"(1) This section applies where a relevant authority make a decision in consequence of which any work is required to be carried out (whether by the authority themselves or by some other person) in accordance with a specification which has been... -

(a) ...

²⁷ See, in particular, the Local Government (Direct Service Organisations) (Competition) Regulations 1993 S.I 848, discussed at length in Part II, Chapter 3

²⁸ S12(3)

(b) made available for inspection in accordance with a notice published for the purposes of section 7(1) of the 1988 Act... "

(2) Where this section applies, it shall be the duty of the authority making the decision-

(a) to make arrangements for-

(i) a copy of the specification; and

(ii) a document containing a summary of the main requirements of the specification, to be kept available, throughout the period during which the work in question is to be carried out, for inspection by members of the public, at all reasonable hours, at the principal office of the authority; and

(b) to give such publicity to those arrangements as they think sufficient for drawing the attention of members of the public who may be interested to the fact that the specification and that document are so available"

Section 10 thus requires that both the specification of functional work which has been the subject of a tendering procedure under S7 of the 1988 Act, and a summary of the main requirements of the specification, must be available for inspection by the public at the head office of the authority at all reasonable hours during the period in which the work defined in the specification is being performed. Moreover, the authority must publish details of the availability of these documents. It is interesting to note that the requirement to make available these documents exists whether or not the work to which the specification pertains is, or is not, performed by the local authority's DSO. Thus the intention of S12 is not so much to permit scrutiny of a DSO, but to facilitate scrutiny of the performance of work irrespective of whether it is performed by the public or the private sector. In respect of work performed by DSO's however, this provision would ostensibly permit members of the public to bring to the notice of the Secretary of State discrepancies between the specification and the performance of work by the DSO which are indicative of a failure to comply with the duty to perform work in accordance with the specification contained in S7(8) of the 1988 Act, and hence permit the Secretary of State to use his S13 and S14 powers. However, for a member of the public to utilise effectively the information to be drawn from a document of such a potentially technical nature as the specification, he or she would have to possess considerable knowledge of the legal framework within which the specification exists, the legal and technical import of

many of the terms used in specifications (given that specifications are often draft contracts), and of the particular work to which the specification relates. One must ask how many members of the general public possess such expertise, and would consequently be able to use the documents prepared under S12 as an effective means of scrutinising performance?

While the statutory scheme contains several measures which have a bearing, to a greater or lesser extent, on holding a local authority accountable for the performance of its DSO, it is perhaps naive to consider each of these provisions in isolation. To appreciate fully the adequacy of the measures relating to the accountability of DLOs and DSOs, one must obtain an overview of all the avenues of accountability: legal, financial, and political.

An Overview of the Avenues of Accountability

There are in essence three strands of accountability: legal, financial and political. The importance of each of these in relation to holding local authorities accountable for the activities of their DSOs must be considered in turn.

The question of legal accountability has not been directly addressed by this chapter, primarily because the most important aspects of legal accountability were dealt with above²⁹. However, the purpose of this discussion is not to explain the mechanics of the process of legal accountability, but to place it in its context. There are primarily two ways in which a local authority may be held accountable for its relationships with, and the performance of, its DSO. The first is accountability to the courts. This will occur almost exclusively where an aggrieved contractor wishes to challenge either the basis on which he has been excluded from a contract award procedure, or the basis on which the work has been awarded to a DSO. In doing so he will probably be trying to avail himself of the remedies which exist by virtue of Part II of the Local Government Act 1988, or are required by the Compliance Directive³⁰.

²⁹ See Part II chapters 5, 6

³⁰ Directive 89/665

However, it should not be forgotten that in the context of the 1988 and 1992 Acts, answerability to the courts is not the only form of legal accountability: authorities are statutorily accountable to the Secretary of State for the conduct of the award procedure if the contract has been awarded to its in-house operation, and for the performance of its DSO or DLO. The legislation, by S13 and S14 of the 1988 Act, establishes the Secretary of State as the principal conduit for seeking redress of failures to comply with the various duties relating to the conduct of the tendering process, and compliance with the duties relating to the accounting regime and financial objectives. It is the Secretary of State to whom authorities will most commonly be answerable to if any question arises regarding failure to comply with the various duties imposed by the 1988 and 1992 Acts.

The Secretary of State also permeates consideration of the financial accountability of local authorities for the actions of their DSOs. While an authority's auditor may have powers to investigate all descriptions on local authority accounts, and to take action whenever he considers that an item of expenditure has been illegal, his powers are neither quite as draconian, nor tailored to the DSOs in the same way that the Secretary of State's are. Once it becomes obvious by virtue of the annual reports submitted to him pursuant to S11 of the 1988 Act that an authority has failed to comply with the duty to achieve the financial objectives required by S10 the Secretary of State may invoke his powers of sanction contained in S13 and S14 of the Act. This is the most obvious, and the most common, means by which local authorities are held accountable for the performance of DSOs.

The role played by members of the public in the process of legal and financial accountability is a peripheral one. While they may make representations to both the Secretary of State and the auditor regarding the activities of DSOs, the ability to make cogent representations may be constrained by virtue of the failure of the statutory scheme to ensure the timeous availability of a sufficient amount of intelligible information. One may therefore assume that members of the public would be most directly involved in the

process of political accountability. However, what is the nature of political accountability in the era of CCT?

In assessing the scope of political accountability for the activities of DSOs, one cannot consider the issue in isolation from the issues of legal and financial accountability, or the nature of the duties imposed by the 1988 and 1992 Acts. The nature of the duties imposed by the legislation is a matter of considerable importance in assessing the scope of the political accountability of local authorities. An examination of the tendering procedures established by the provisions of the 1988 and 1992 Acts, and of Part II of the 1988 Act reveals that the intention of the legislation is to restrict the discretion of local authorities to award work and enter into contracts in the circumstances and on the terms which authorities would desire. If an authority wishes to award work to its DSO it must comply with the tendering procedures prescribed by the 1988 and 1992 Acts, or be prepared to endure the exercise by the Secretary of State of his powers of sanction, which may include the closure of the body to which the authority seeks to award work. Similarly, if a local authority seeks to take into account any matter proscribed by the non-commercial considerations regime contained in Part II of the 1988 Act, it will open itself to challenge in the courts. In such circumstances accountability in the course of the political process becomes, at best, a peripheral issue. The reason for this is simple: the statutory duties relating to the tendering process and the exclusion of non-commercial considerations are of a very strict nature. The scope of any discretion given to authorities is very limited, matters often being reduced to the black-and-white issue of whether or not a statutory duty has been complied with, and authorities which do not comply with those duties lay themselves open to sanctions imposed by the Secretary of State, or challenge in the courts.

As authorities no longer enjoy the discretion to award contracts which they once did, there is a corresponding diminution of the importance of political accountability: the decisions of local authorities are no longer constrained by what is politically acceptable, but instead by what is legally required. The scheme of

the legislation imposing CCT renders local authorities accountable for their actions in awarding contracts to DSOs, and for the performance of those bodies, not to their fellow politicians, or to the public, but primarily to the Secretary of State: what is acceptable to him as being in accordance with the statutory provisions is the most important consideration. This may, however, be indicative of the deeper trend referred to as the politicisation and juridification of central-local government relations³¹. A formal legal relationship has been established whereby authorities are principally accountable to the Secretary of State for their compliance with statutory duties relating to the award and performance of work, rather than, as was formerly the case, accountable through the political process for the exercise of their broad discretion. Certainly, one could contend that the 1988 and 1992 Acts do not replace political accountability, as authorities will ultimately be accountable to the public when councillors are periodically exposed to the rigours of seeking re-election. This suggestion ignores two important matters. First, at elections, voters are likely to take into account a wide variety of issues, and not limit themselves to considerations of a DSO's activities. Secondly, such a suggestion misses the point that in the period between elections, political accountability is marginalised by the nature of the statutory duties, and the dominant position of the Secretary of State.

In addition to the depoliticisation of decisions regarding service delivery which is intrinsic to the scheme of the CCT legislation, there is some indication that one of the collateral effects of CCT is a reduction in member involvement in the competition process and in the management of DSOs after the contract has been awarded³². In some instances DSO managers have sought to reduce member involvement³³, and in others have sought to reduce the flow to members of information which they consider to be commercially

³¹ See Loughlin, "The Restructuring of Central-Local Government Relations" in Jowell and Oliver (eds.), *The Changing Constitution*, 3rd Ed (1994); Loughlin, *Local Government in the Modern State* (1986) chapter 9

³² See Walsh and Davis, *Competition and Service: The Impact of the Local Government Act 1988* at 3.22-28

³³ *Ibid.* 3.25

sensitive³⁴. It is inevitable that both courses of action will reduce the ability of members to scrutinise the activities of DSOs, and certainly raises questions about whether councillors should be considered politically accountable for the actions of DSOs when managers actively seek to reduce member involvement in their affairs, and restrict the flow of information which is an essential element of the accountability process. Nevertheless, it would appear that members do tend to become more involved in the activities of DSOs when significant problems arise³⁵, particularly when local political problems arise³⁶. However, this may simply be a reflection of the natural tendency of politicians to become more directly involved in controversies concerning service delivery when issues of political salience arise³⁷.

One final matter regarding political accountability for the performance of DSOs must be considered. While the legal duty to separate client and contractor functions relates only to the conduct of the tendering process³⁸, it has become accepted practice in many authorities to continue this separation of roles during the performance of work, and to maintain distinct client and contractor committees. This continuation of the client-contractor split into the period during which work is performed has led to problems relating to the confidentiality of information, with some DSO managers wishing to ensure that certain information is not only placed beyond the purview of private sector competitors, but also that of the client side³⁹. This could only be effectively achieved by ensuring that information relating to the DSO was not only unavailable to members of the client-side committee, but also from those members of the authority who are not members of the contractor-side committee. By denying such information to such a wide range of

³⁴ Ibid. 3.10. See below on this point

³⁵ Ibid. 3.26

³⁶ Ibid. 3.27

³⁷ See e.g. Dudley, *The Next Steps Agencies, Political Salience and the Arms Length Principle*; Barbara Castle at the Ministry of Transport 1965-68 [1994] 72 *Public Administration* 219

³⁸ Local Government (Direct Service Organisations) (Competition) Regulations 1993 S.I. 848, regulation 4, discussed in Part II, chapter 3, *supra*.

³⁹ See Walsh and Davis, *Competition and Service: The impact of the Local Government Act 1988*, at 3.10

members, the possibility that the DSO would be subject to effective scrutiny by members would be reduced. However, this is not the only way in which the client-contractor split may impact on issues of accountability. One other difficulty for the process of accountability is that, while it would appear that the situation has improved since the introduction of CCT, the division of responsibilities between client and contractor may still lack clarity⁴⁰. Where uncertainty exists as to which officers are responsible for which duties, or as to the nature of officers' duties, this confusion will inevitably affect the ability of members to scrutinise effectively the activities of DSOs and the conduct of the competition process and contract management. Lack of clarity as to the division of responsibility between client and contractor also leads to confusion as to the role of client and contractor committees⁴¹. However, it would appear that members of local authorities possess a low level of understanding of the client-contractor split⁴², as is evidenced by the tendency of councillors to direct complaints regarding service delivery to the contractor, rather than the client, side⁴³. Where a lack of understanding exists on the part of members as to the implications of the client-contractor split, and especially the division of responsibilities which arises therefrom, this impacts on the process of political accountability in two ways. First, once again, if councillors do not understand the way in which something works, they are unlikely to be able to scrutinise effectively the activities of an authority's officers. Secondly, where councillors find their involvement in the process of competition and contract management increasingly marginalised by, amongst other things, a lack of understanding of the operation of the client-contractor split, which is essentially a technical, and arguably artificial, effect of the 1988 Act's operation, tensions arise for the traditional view of members' political accountability for the activities of their local authority. Indeed, when a lack of understanding of the client-contractor split is compounded by the tendency of some DSO managers to marginalise the involvement of members in their

⁴⁰ Ibid. 2.19-20

⁴¹ Ibid. 3.17

⁴² Ibid.

⁴³ Ibid. 3.18

affairs, it is arguable that the view that councillors should be considered to be politically accountable for the activities of DSOs is little better than a quaint fiction which could only work in an outmoded institutional model.

CONCLUSIONS

An examination of the statutory scheme reveals one vitally important feature: the dominant role of the Secretary of State. While the auditor may have a role to play in ensuring that an authority is financially and legally responsible for its disbursements, his is a power of general overview, whereas the Secretary of State has a specific role, and exercises specific sanctions in relation to DSOs. Similarly, while aggrieved contractors may seek redress in the courts for failures to comply with the tendering process, the powers of investigation and sanction entrusted to the Secretary of State by the 1988 Act are the more obvious, and by far the more commonly used means of redressing failures to comply with these statutory duties. The role played by the general public in the process of accountability is of peripheral importance: while a member of the public may make representations to the Secretary of State in an attempt to persuade him to exercise his statutory powers of sanction, or to raise objections before the auditor, there are problems regarding the availability of information on which to base such representations, and the most important information relating to DSO's financial performance will already be in the hands of the Secretary of State and auditor, while information regarding the mode of performance of work will effectively be comprehensible only to those possessing a measure of legal and local government expertise.

Perhaps the most significant inference to be drawn from the statutory scheme establishing CCT is that political accountability has been reduced to little more than a marginal issue. As the statutory scheme establishes a series of rigid duties, leaves little discretion to local authorities, and establishes the Secretary of State in a dominant position, by ensuring that authorities are answerable to him for compliance with the duties relating to the

tendering process and the performance of DSOs, the traditional picture of political accountability is not only disrupted, but replaced. Whereas the traditional situation would have been that accountability for the exercise of a discretion would have existed primarily via the political process, it is now the case that, with the imposition of a series of formal legal duties, the scope for purely political accountability is reduced, more so because the statutory scheme does not simply impose those duties, but emphasises that authorities are responsible to the Secretary of State for adherence to those duties, and may ultimately be sanctioned by him for non-adherence.

Several of the problems regarding accountability are, however, indicative of deeper trends and tensions regarding service delivery and accountability. One of the trends in accountability over the past few decades is the tendency to involve experts in the scrutiny of the actions of public authorities⁴⁴. However, the scheme of the 1988 Act is such that it not only involves experts in the process of accountability, by involving both auditors and civil servants in the examination of the DSO accounts, and civil servants in particular in the examination of allegations of anti-competitive practice, but produces a range of information which will generally be intelligible only to those who possess some form of expert knowledge. As the flow of information is the essential prerequisite to the scrutiny of any public body, the production of a range of information which may only be used effectively by those possessing a degree of expertise makes the process of accountability an increasingly rarefied and specialised exercise.

Secondly, there is the issue of the extent to which accountability reflects responsibility:

"... the growth of services and the division of responsibility for them between central and local government also raises questions about different lines of accountability. If responsibility is the other side of the coin of accountability, if the two would seem to be logically indivisible then local provision of services would appear to imply accountability to the local body of citizens ... But if responsibility for setting objectives

⁴⁴ See e.g. Day and Klein, *Accountabilities* (1987) Chapter 2

and defining rules is national, if the aim is to achieve a 'uniform' pattern of service delivery, while responsibility for providing services is local, where then does the accountability lie? Is the concept of accountability divisible?"⁴⁵

The CCT legislation certainly raises questions about the division of responsibilities between the Secretary of State and local authorities. The Government has clearly attempted to shape the competition process in order to reflect its own agenda and has endowed the Secretary of State with considerable powers to amend and adjust the tendering process, and with other powers the exercise of which affect the way in which local authorities deliver services⁴⁶. As has been noted above, the 1988 Act is one particular measure aimed at restricting the discretion of local authorities regarding the delivery of services. This therefore illustrates to some extent the tension which Day and Klein refer to. However, the 1988 Act provides some answer to the questions posed by Day and Klein. By the 1988 Act central government has sought to increase accountability and responsibility for decisions falling within the legislation's ambit in inverse proportion to the diminution of local authority discretion which the statute effects. This situation leads one back to the question posed by Day and Klein: when central government sets the objectives and rules regarding the delivery of services, while local government is responsible for the delivery of the services in question, where does accountability lie? The tensions inherent in such a situation are obvious. However, the 1988 Act puts forward its own solution to the problems of accountability arising from such a situation by providing that accountability will lie squarely with local authorities.

However, one aspect of the division of responsibilities which Day and Klein do not address, perhaps because it was not such an issue of consequence when they conducted their research, is the client-contractor split. This is a division of responsibilities now prevalent within most public authorities engaged in service delivery. However, as has been noted above, in local authorities the division of

⁴⁵ Ibid. p18

⁴⁶ See above, *passim*

responsibilities between client and contractor may have a disruptive effect on the accountability process.

One final observation of Day and Klein's which is of interest in assessing the impact of CCT on accountability is that:

"Compounding the problems of accountability in the service delivery state is the growth of professionalism ... For this introduces yet another dimension into the chain of accountability, so breaking the chain. Central to the notion of professionalism is the assertion that what defines a professional is precisely the fact that he or she is accountable only to his or her peers."⁴⁷

The last few decades have witnessed the rise of the "local government professional": in broad terms the officers of local government. The ascendancy of local government officers over elected members is one of the effects of the legislation, as CCT is very much an officer led exercise. This has its own implications for accountability, as is illustrated by the desire of some DSO managers to exclude elected members from involvement in DSO affairs, and to prevent the flow of information to members which they consider to be commercially sensitive. There is a link here between the rise of the local government professional and the division of responsibilities inherent in the client-contractor split which arises by virtue of the legislation's operation

Consideration of the issue of CCT and accountability therefore reflects some light on some problems of accountability which affect a wide range of public services. The strains placed on the various avenues of accountability may well be exacerbated by the imposition of new institutional structures, the client-contractor split, and the increasingly technical nature of service delivery. The 1988 Act, and especially its emphasis on financial accountability, and accountability via the Secretary of State, reflects a trend to make accountability an increasingly technical exercise, conducted via particular channels, and marginalising the political process of accountability. However, one may pose the question: does this tendency to rely on more technical and specialised methods of

⁴⁷ Day and Klein, op. cit. p 19

accountability not merely reflect the increasingly technical and specialised nature of government, and the diminution of discretion and political judgement in decision making which marginalises the position of politicians in favour of expert officials and professionals? It would be naive to assume that methods of accountability developed in an earlier era to effect scrutiny of a different institutional model of government which performed its tasks by different means will provide an adequate means of accountability in an era when market forces are becoming the dominant factor in defining the province of government, its institutional structure, and the means by which it performs its tasks. The methods of accountability must be tailored to the institutional structures and working practices which they are intended to scrutinise. Thus the complexity and technical nature of the legal and institutional framework will be reflected in the accountability mechanisms, and it is therefore inevitable that, if the complexities of service delivery necessitate the possession of expertise, then scrutiny of performance will only be effective when carried out by those possessed of the necessary expertise. If the role of politicians in making decisions as to service delivery is reduced by the technical nature of the subject, their lack of expertise will be reflected in an increasingly marginal role in scrutiny of performance.

PART III, CHAPTER 2

CONCLUSIONS

In considering the development of CCT it is necessary to consider first what inferences may be drawn from the patterns of service delivery which have prevailed over several centuries. As was noted above¹, during the period in which local authority functions were expanding, a process which was particularly pronounced between 1830 and 1945, while there may have been a considerable expansion of the local government workforce, it could not be said that there was an automatic assumption that work should be performed by local authority employees rather than those of contractors. Indeed, while the first direct labour organisation was established in 1893, in West Ham, it would appear that, whether by choice or by reason of necessity, contractors were engaged by local authorities until the 1950s, and most major works of construction have traditionally been performed by private contractors rather than direct labour. It was perhaps only with the rapid expansion of the local authority workforce between 1960 and 1975 that the perception that services must be delivered via direct labour gained acceptance. Moreover, there is evidence that from at least the mid-eighteenth century onwards the accepted mode of selecting the contractors who would perform work was competitive tendering. It is thus evident that the use of contractors and competitive tendering in local government is not a novel concept, but one which has a considerable historical basis.

By the mid-1970s, however, concern was being expressed about the performance of building and works direct labour organisations, a situation exemplified by a report of the Chartered Institute of Public Finance and Accountancy in 1975². It was widely accepted that the inefficiencies of DSOs identified in the CIPFA report would have to be addressed by legislation imposing competitive tendering and a new accounting regime. It was five years, however, before Part III of the Local Government, Planning and Land Act 1980 imposed

¹ See Introduction, above

² See Direct Works Undertakings Accounting, CIPFA, 1975

compulsory competitive tendering for construction and maintenance work upon local authorities, as well as imposing an accounting regime specifically intended to facilitate monitoring DLO performance. While the 1980 Act was the first statute to impose CCT, it must be noted that it was the result of a considerable degree of consensus between Conservative and Labour politicians which was rooted in a common acceptance of the CIPFA report's recommendations. However, while there was a considerable degree of consensus regarding the 1980 Act's provisions, these have been extensively amended by the 1988³ and 1992 Acts⁴, both of which are manifestations of a different train of political thought.

Following the passage of the 1980 Act the focus of debate shifted to competitive tendering for, and contracting-out of, local authority services, taking a path which would ultimately lead to the passage of the Local Government Act 1988. Whereas the debate surrounding the passage of Part III of the 1980 Act had been marked by a considerable degree of consensus, the distinguishing factors of the debate which resulted in the imposition of CCT for local authority services were the increasing importance of New Right ideology in the Conservative party, and a lack of coherence in the policies of successive Conservative administrations. The importance of New Right thinking is illustrated by an unswerving belief in the superiority of the market⁵, and in the need to reduce public expenditure. However, while the public pronouncements of Conservative politicians and think-tanks may have been at pains to emphasise the superiority of market forces, the development of policy on competitive tendering for local authority services is particularly intriguing. It is noteworthy that the initial impetus for competitive tendering for local authority services did not come from ideologues in think-tanks or Parliament, but from a small number of Conservative-controlled local authorities which generally had adopted policies on competitive tendering and contracting-out during the winter of discontent in 1978-9. Conservative ministers identified what they perceived to be the advantages which the

³ S32 and Schedule 6

⁴ Schedule 1

⁵ See e.g. Forsyth, *Re-Servicing Britain*, 2nd Ed. 1981

adoption of such market-based techniques had brought these authorities. Consequently, between 1980 and 1985, Government ministers adopted a policy of encouraging other local authorities to adopt a competitive tendering and contracting-out in the pursuit of greater value for money, more efficient services, and the opportunity to reduce public expenditure, although from 1983 onwards it was clear that both ministers and Conservative backbenchers were growing increasingly frustrated at the failure of this policy to convince local authorities of the merits of competitive tendering. Thus, in early-1985, with the publication of the consultation paper *Competition in the Provision of Local Authority Services*, the policy moved from one of encouraging local authorities to use competitive tendering to one of compelling it. However, this policy initially met with no greater success: no legislation was forthcoming in the 1985-6 session, and when the Local Government Bill had its second reading in early-1987, the Secretary of State for Environment was forced to admit that the provisions relating to CCT and the non-commercial considerations regime had not yet been prepared, in spite of the fact that it had been two years since they had been first mooted, and that consequently the Government would be unable to bring those provisions before Parliament in the 1986-7 Session.

After the 1987 General Election, however, the Government did bring both the CCT regime for local authority services and the non-commercial considerations regime before Parliament. These duly found their way into the Local Government Act 1988. The services covered by the CCT regime were essentially blue-collar services, however, and it had been indicated during the Bill's Committee stage that services would only be added to the list of defined activities if the savings which could be realised from subjecting them to CCT would be "substantial", and if the service itself was sufficiently definable for specifications to be drawn up. This formulation simultaneously set out the criteria for extending CCT to new services, and apparently excluded the possibility of extending CCT to administrative, technical and professional services due to difficulties in defining the content of many of these services. Nevertheless, it soon became apparent that, having established those

criteria, the Government were prepared to ignore them in the pursuit of extending the influence of market forces to every possible aspect of the public service. The pronouncements of Government ministers followed the pattern of praising the initiative of those (invariably Conservative) authorities which had voluntarily submitted white-collar services to competitive tendering, and emphasising the savings which they had made. However, it quickly became apparent that the Government would compel competitive tendering for local authority white-collar services⁶. In spite of the criteria which it had previously indicated would be applied, and an adverse report by a firm of consultants which it had engaged, the Government secured the enactment of S8 of the Local Government Act 1992 in order to facilitate the establishment of regimes for each professional, administrative or technical service. However, S8 is an unnecessary provision, as the same result can be achieved using the various powers contained in the 1988 Act⁷. Consequently it has never been brought into force, and the expansion of CCT to white-collar services has proceeded on the basis of the powers contained in the 1988 Act. Even then a certain lack of coherence has been evident in the expansion of CCT to professional and administrative services in view of the considerable delays involved in defining the first white-collar services.

One further theme which permeates the debate on the application of CCT to local authority services is the position adopted by Government ministers regarding the savings to be realised from competition. In relation to both blue collar services and white-collar services ministers were often at pains to point to savings in the region of twenty to thirty per. cent. However, on occasions, when pressed, ministers would admit that no central figures were maintained on this matter, and on one notorious occasion when a minister stated that the savings to be realised represented a significant saving in percentage terms, the figures which he simultaneously discussed did not support his contention. Once again this illustrates the lack of coherence in the Government's policy

⁶ See e.g. *Competing for Quality*, Cm 1730 (1991) pp 24-5

⁷ See Part I, Chapter 4, and Part II, Chapter 1 on this point.

statements. It would now appear that the savings to be realised from CCT are on average around 6.5 per cent⁸.

Having noted the lack of coherence which was evident in the policy of first imposing CCT for services, and then the expansion of the range of services subject to competition, it now remains to consider the legal regime itself. Part I of the 1988 Act initially subjected seven services to CCT, although it did provide the Secretary of State with the power to add other services to the list of defined activities⁹: there are no constraints on the range of services which may be subject to the exercise of this power, which has been used to add not only new blue-collar services such as supervision of parking to the list, but also white-collar services such as legal services and housing management.

The most significant element of the 1988 Act is undoubtedly the tendering regime contained in Part I. The first, and most important, thing to note about the tendering regime is that it only applies when a local authority wishes to use either its own, or another authority's DSO to perform a service. The functional work regime established in sections 6 to 8 of the 1988 Act established six conditions which have to be complied with where local authorities intend to perform work via a DSO. Five of these conditions constituted the tendering regime, while the sixth imposed a duty to comply with the detailed specification of the work to be performed¹⁰. The tendering regime contained requirements as to publication of tender notices, the availability of a detailed specification of the work to be tendered for, the issue of invitations to tender to those who have notified an authority of their interest in being awarded work, and the submission of a DSO bid, and also a prohibition of anti-competitive conduct on the part of the local authority: the last is undoubtedly the most significant of the conditions, as the concept of anti-competitive conduct permeates every aspect of the tendering process. The regime established by the 1988 Act was exacting, but not without its failings. Chief amongst these was the failure to put

⁸ See Walsh and Davis, *Competition and Service: The Impact of the Local Government Act 1988* at 13.5

⁹ S2(3)

¹⁰ S7(8)

in place any mechanism for defining what would constitute anti-competitive conduct for the purposes of the crucial prohibition of such practices contained in S7(7): the failure to attempt to define the conduct which would satisfy this prohibition, which permeates the conduct of tendering procedures, further illustrates the lack of thought which was initially given to establishing a fully coherent tendering regime. This deficiency was remedied by S9 of the Local Government Act 1992 which endowed the Secretary of State with powers to set time periods for several stages of the tendering process, to issue regulations regarding the matters which must be taken into account in the course of any evaluation for the purposes of deciding who should carry out work, to issue regulations defining conduct as anti-competitive, and to issue Guidance on avoiding anti-competitive conduct.

It is the regulations and guidance on anti-competitive conduct which reveal most about the model of competition which the Government wish to pursue. The Competition Regulations¹¹ specify a number of matters which may or may not be taken into account in evaluating tenders, and specifies the form of calculating the tenders of both private contractors and the DSO. They also establish the client-contractor split during the course of the tendering process. However, it is perhaps the Guidance which is the more important document, and is arguably the most worrying element of the system of regulation which has developed around the 1988 Act, as the Secretary of State does not have to lay the Guidance before Parliament, unlike the Competition Regulations, for example, and may thus reformulate the concept of anti-competitive conduct without submitting it to Parliamentary scrutiny. Certain provisions of the Guidance appear to be intended to assist private sector contractors, rather than merely prevent local authorities from acting anti-competitively as the 1988 Act requires¹². The Government's desire to assist the private sector in winning work is particularly evident in the provisions of the Guidance relating to

¹¹ Local Government (Direct Services Organisations) (Competition) Regulations 1993 S.I. 848

¹² See e.g. *R v Secretary of State for the Environment ex p. Knowsley M.B.C.*, 31/7/91 (unreported) per Ralph Gibson LJ on the policy and purposes of the 1988 Act

packaging of work and in the attempts made to exclude local authorities from referring tenderers to the potential effects of the Acquired Rights Directive¹³, which, where it applies to a relevant transfer of an undertaking, would mean that a private contractor would have to engage local authority contracts on the same terms and conditions as they had enjoyed as local authority employees, thus precluding the opportunity for the contractor to reduce pay and conditions in an attempt to win contracts or maximise profits. Moreover, the Guidance, in defining the model of competition which the Government wishes authorities to adhere to, contains a number of provisions which, variously, cannot survive scrutiny against the provisions of the 1988 Act, and in the case of its provisions regarding authorities' discretion to take redundancy payments into account it even contradicts the Competition Regulations pursuant to which it is issued. Perhaps most importantly, however, many of its provisions conflict with the EC public procurement regime.

In evaluating the tendering regime which has developed around the provisions of Part I of the Local Government Act 1988 it is vital to assess the legal propriety of the tendering regime against the standards set by the EC public procurement regime. The element of the EC public procurement regime which is of most direct relevance in assessing the provisions of the 1988 and 1992 Acts is the Services Directive (Directive 92/50). Certainly there is considerable identity of subject matter between the services subject to Directive 92/50 and those subject to CCT by virtue of the 1988 Act. However, scrutiny of the 1988 and 1992 Acts' provisions is made more complex by the two-tier application of Directive 92/50¹⁴, although this aspect of the Directive must be reviewed by 1st July 1996 with a view to ensuring the application of the Directive's provisions in their entirety to all tendering exercises¹⁵. The implication of this is that, when the Directive's two-tier application is dispensed with, then all of the tendering exercises conducted pursuant to the 1988 and 1992 Acts must conform to the standards set out in the

¹³ Directive 77/187

¹⁴ See Articles 8,9. Contracts for those services listed in Annex 1B must only comply with the Directive's requirements as to technical specifications and advertisements

¹⁵ Article 43

Directive. At present, the tendering procedures established by the 1988 and 1992 Acts provisions for services which are both defined activities for the purposes of the 1988 Act and fall within Annex 1A of Directive 92/50 do not bear favourable comparison to the provisions of the Services Directive. The provisions of both the 1988 and 1992 Acts, the delegated legislation issued pursuant to them, and the Guidance on anti-competitive conduct are at variance with the EC procurement regime on a number of important issues. The most obvious of these are the domestic legislation's confused position on the number of potential contractors who should be invited to submit tenders; the position on evaluating the ability of potential contractors to perform work; the persistent attempts to prescribe the criteria which may be taken into account in tender evaluation, a matter which the EC public procurement regime emphasises must be left to contracting authorities to decide in the context of each tendering exercise; and attempts to exclude authorities from referring tenderers to employment protection provisions such as TUPE. It would appear that in developing the tendering regime for services subject to the 1988 Act Her Majesty's Government has largely ignored the implications of the EC public procurement regime.

In considering the impact of the EC procurement regime one must also realise that it does not simply provide a set of standards against which the legal propriety of the 1988 and 1992 Acts and subordinate legislation can be evaluated. It also establishes its own requirements which must be complied with in addition to the domestic tendering regime: these are most evident in relation to the publication and content of tender notices, and requirements as to the content of technical specifications.

The 1988 Act, however, does not simply establish a tendering regime for local authority services. It also puts in place a system of sanctions which the Secretary of State may impose on local authorities which fail to comply with either the tendering regime, or the duty to perform work in accordance with the detailed specification, or the duties regarding the maintenance and publication of accounts and annual reports regarding the

performance of DSOs. The powers contained in S13 and S14 of the 1988 Act are intended to provide the main avenue of redress for those who wish to make complaints about the conduct of tendering procedures. Certainly the anonymity of this process and its lack of expense will be attractive to those who wish to make complaints. However, for the purposes of the Compliance Directive¹⁶, this procedure cannot be characterised as an effective remedy for those contractors who wish to seek redress for a failure to comply with the various elements of the EC public procurement regime in the course of a tendering exercise, on account of the fact that it is neither a detailed legal procedure specifically available to aggrieved contractors, nor are damages available via this procedure. This is not to say that an adequate range of remedies is not available for an authority's failure to comply with the requirements of the EC public procurement regime, as suitable provision has been made elsewhere to ensure that this is the case¹⁷, while there is an adequate range of remedies available to a contractor wishing to raise an action based on a failure to comply with the duties contained in the domestic tendering regime¹⁸.

In considering the tendering procedures contained in Part I of the 1988 Act one must also consider the impact of the non-commercial considerations regime contained in Part II of that Act upon tendering procedures. Part II of the 1988 Act not only prohibits local authorities from taking a range of non-commercial considerations into account at any stage of the tendering process, but also effectively establishes a duty to give reasons to those potential contractors who have either been excluded from the award procedure at some stage of the process, or whose tenders have been unsuccessful, and defines the circumstances in which contractors alleging a contravention of the non-commercial considerations regime will have a right of access to the courts. In considering the impact of the non-commercial considerations regime contained in S17 of the 1988 Act upon tendering procedures one must appreciate that it not only regulates every aspect of the tendering procedure,

¹⁶ Directive 89/665

¹⁷ Public Services Contracts Regulations 1993 S.I. 3228, Regulation 32

¹⁸ See Part II Chapter 5

but also the range of conduct which is prohibited. The matters which are defined as non-commercial considerations are extensive, but not exhaustive. Perhaps the most significant non-commercial consideration listed is the terms and conditions of employment. In prohibiting local authorities from asking questions of potential contractors concerning the terms and conditions of their workforce, the 1988 Act would appear to conflict with Directive 92/50 once again¹⁹. However, in considering the impact of the non-commercial considerations regime one must also consider its nature. The intention of the non-commercial considerations regime is to constrain the discretion of local authorities to take certain decisions relating to the delivery of services. However, this is not merely the intention of Part II of the 1988 Act: the object of Part I of the Act is also to remove a large measure of the discretion which local authorities formerly enjoyed in making decisions about the way in which services should be delivered.

In considering the 1988 and 1992 Act's regulation of CCT a number of conclusions can be drawn. First, one cannot escape noticing that one of the objects of the legislation is to constrain the discretion of local authorities to make certain decisions regarding the delivery of services by compelling local authorities to expose a range of services to competitive tendering by virtue of a regime which is closely prescribed by central government. Secondly, the range of services subject to CCT is an expanding one, and the powers given to the Secretary of State are such that any conceivable service performed by local government may be added to the list of defined activities. Thirdly, one must express concerns about the tendering regime established by the 1988 and 1992 Acts. As certain provisions of the Guidance illustrate, the Government appears to be attempting to move away from the intention expressed in the long title of the 1988 Act that "local... authorities undertake certain activities only if they can do so competitively" towards a system of competition in which authorities will be accused of acting anti-competitively if they do not take positive steps to increase the likelihood of private contractors succeeding in tendering exercises: this must be the source of some concern as it conflicts with the policy and purposes

¹⁹ Article 28. See Part II, Chapter 6 for a discussion

of the 1988 Act. Chief amongst the list of concerns to be expressed about the expanding web of regulation surrounding CCT, however, is the legal propriety of many of the provisions. The provisions of many aspects of the subordinate legislation issued pursuant to the 1988 and 1992 Acts, particularly that relating to the central issue of anti-competitive practices, do not bear scrutiny against the provisions of the primary legislation. Furthermore many of the provisions of the tendering regime established by the 1988 and 1992 Acts and the subordinate legislation issued under it, as well as of the non-commercial considerations regime established by Part II of the 1988 Act cannot survive evaluation against the standards of the EC public procurement regime. In view of these concerns about the legal propriety of many elements of the tendering regime it is clear that a thorough re-evaluation of the provisions of the 1988 and 1992 Act is necessary.

Considering the possibility of a re-evaluation of the provisions of the tendering regime put in place by the 1988 and 1992 Act's raises wider questions about the future of CCT, and indeed raises questions about the position of CCT in relation to other initiatives concerning the restructuring and working practices of governmental institutions. The future of CCT, however, is closely linked to wider political developments, in particular the outcome of the next general election.

The first question one must pose is: what direction will CCT take if the present Conservative administration continues in power after the next general election? This raises consideration of whether there may be any radical shift in the direction of Conservative party policy if it were to find itself in government for a fifth successive term. At present, given that the Right of the Conservative party received a significant rebuff in the leadership election of mid-1995, and in view of a distinct lack of new policy initiatives, the possibility of a new radical departure in the CCT regime would appear unlikely, but not impossible, especially if a deepening economic recession necessitated significant reductions in public expenditure. However, one of the distinguishing features of the policies of successive Conservative administrations over the past

sixteen years, and one which has been no less evident in relation to CCT, has been a lack of coherence. The lack of coherence in the development of policy may make predictions as to the direction which policy will take more difficult, but certain inferences may be drawn from developments thus far.

In attempting to predict policy developments one may assume that the Conservative party will not abandon its belief in the natural superiority of the market. This is likely to remain a key factor in determining the shape of future policy initiatives. In view of this fact it is highly likely that the range of services subject to CCT will once again be expanded. In spite of recent assurances²⁰, therefore, it is not inconceivable that CCT may be extended to corporate and administrative support services, for example. Secondly, should the national economy continue to deteriorate, and a policy of reducing public expenditure is pursued there are two possible consequences for CCT. The first is that the Government may attempt to redefine the criteria which may be taken into account in evaluating tenders in an attempt to diminish the possibility of DSOs winning work and to increase the likelihood that those private contractors who win work by reducing workforce costs, or by ignoring certain legal obligations which are incumbent upon them, for example, stand a greater chance of success. The second is that the Secretary of State may specify increasingly stringent financial obligations using his powers contained in S10 of the 1988 Act: having done so, it would be inevitable that an increasing number of DSOs would fail to meet the required rate of return of capital employed, thus resulting in the Secretary of State being able to use his powers of investigation contained in S13, and then the powers of sanction set out in S14 to, for example, remove from local authorities the power to perform an activity via their DSOs, or to force a new tendering procedure in the hope that it would result in reduced costs. It is thus unlikely that CCT will be abandoned by a Conservative government, but there is one effect of the Secretary of State's use of his powers to define anti-competitive conduct, to sanction local authorities for failures in the tendering process, and to meet their financial objective, which must be adverted to. If the Secretary of State chooses to

²⁰ See e.g. 1994-5 HC Debs Vol 250 cols 879-880w

redefine dramatically the criteria regarding the calculation and comparison of tenders in a way which reduces the chances of a DSO being successful, or imposes a more severe financial objective which would lead to more DSO financial failures, then the effect would be, respectively, that DSOs would find themselves less "competitive" and lose work, or be subject to sanctions, including closure, imposed by the Secretary of State using his S14 powers: indeed the operation of the 1988 and 1992 Acts is at present leading to a gradual erosion of the work performed by DSOs due to the application of such measures. The implication of this for the future of the legislation is that tendering exercises under the 1988 Act will become progressively less significant: as DSOs disappear by virtue of the application of its provisions, the 1988 Act's scope will be reduced as local authorities increasingly perform work via private contractors. While the CCT legislation may thus by its operation effectively reduce the scope of its application, there is one further possibility regarding its extension which must be considered.

Hitherto CCT has applied to the work performed by DSOs, as opposed to the functions performed by local authorities. However, the provisions of Part II of the Deregulation and Contracting Out Act 1994 permit local authorities to contract out voluntarily the performance of their statutory functions, thus enabling the delegation of a broad range of discretionary decisions to the private sector. The main implication of contracting out functions, as opposed to the performance of services, is that, as the whole function is contracted out, it is possible to contract out the client side of the function as well as the contractor side: an authority which used the powers contained in the 1994 Act would be much more of a minimalist, enabling, authority, than one which was merely subject to CCT. It is likely that, as with competitive tendering and the contracting out of services, that the first authorities to contract out their functions will be Conservative controlled councils (of which there are presently comparatively few following the 1995 local elections) whose leaders, like those in Westminster in the early-1980s, are possessed of a strong belief in the supremacy of market forces. If those authorities which avail

themselves of the power contained in Part II of the 1994 Act to contract out their functions to the private sector then begin to proselytise about the advantages, and in particular any savings, which may result from doing so, it is possible that the policy of a Conservative Government on this issue will mirror the development of policy on competitive tendering for the performance of local authority services over the last fifteen years. At first, local authorities would be encouraged to follow the example of a few Conservative councils and use their powers under the 1994 Act to realise the benefits of having the private sector perform their functions. When local authorities fail to respond to such encouragement, it is possible that a Conservative Government would seek to enact legislation which effectively imposes CCT upon the functions of local authorities, as opposed to the performance of services.

If it is likely that a Conservative Government would maintain the CCT legislation, and possibly expand its effect, it is more difficult to assess what direction the policy of a future Labour government would take. Officially the policy of the Labour party is that CCT would be abolished, to be replaced by an alternative initiative which has as yet not been clearly formulated²¹, although it is also clear that some within the Labour party do not necessarily agree with the policy of abandoning CCT and see some efficacy to its retention in some form²². Uncertainty about what form Labour's policy on CCT will finally take raises two issues. First, how simple would it be to abolish CCT. Secondly, if CCT is not to be abolished, how should it be revised.

A policy of abolishing CCT encounters a number of problems. First, by what means is abolition to be effected? If the provisions of the Local Government Acts 1988 and 1992 are simply to be repealed an Act of Parliament will be required, which will inevitably take some time to pass. In the interim, the CCT legislation will still be in force, and authorities will be forced to comply with its provisions,

²¹ See Composite 42, which was passed at the Labour Party Conference in October 1995

²² See e.g. Competition leaves Labour in a tender spot, 22/5/95 FT 8

as a failure to expose work to competition would expose authorities to the possibility of actions being raised for breach of statutory duty arising from their failure to comply with the statutory scheme. A new Secretary of State may be tempted to forestall the possibility of actions being raised by removing all of the services subject to CCT from the list of defined activities contained in S2 of the 1988 Act, but this would not be possible: while S2 provides a mechanism for adding services to the list of defined activities, there is no mechanism for removing them from that list. Furthermore, any attempt to extend the moratoria for CCT arising from reorganisation until such time as the 1988 and 1992 Acts could be repealed would be open to challenge on the grounds that the powers to grant such moratoria were being used for a purpose which was at variance with the purposes for which the legislature had enacted them. It is thus obvious that any Government which wished to abolish CCT would face a period prior to the enactment of the necessary legislation where, contrary to its own policy, the 1988 and 1992 Acts would have to be complied with by authorities. Certainly, during this period the Secretary of State could revise the Guidance on anti-competitive practices and take a more relaxed view of how to exercise his powers under S13 and S14 of the 1988 Act to sanction authorities for a failure to comply with the tendering regime, but this would not preclude aggrieved contractors from raising actions against authorities on the grounds that in the conduct of tendering procedures they had either failed to comply with the statutory duties imposed by the 1988 and 1992 Acts, or with the standards contained in the EC public procurement regime. At the Labour Party Conference in October 1995, Composite 42 was passed, which, amongst other things, "calls for an incoming Labour government to use its powers under existing legislation to ensure that no local authority is required to let a contract under the CCT regime, until such time as a permanent legislative change can be made". An examination of the relevant legislative provisions reveals that such a course of action is not a viable legal proposition

One other problem regarding attempts to abolish CCT relates to work in progress at the time of its abolition. While CCT has not resulted in the private sector winning as much work as successive

Conservative administrations would have liked, it is clear that there are now a significant number of contracts between local authorities and private sector contractors for the provisions of services. Problematic issues do not actually arise at the point when CCT would be abolished, but when those contracts come to an end. Would authorities simply see the end of a contract with the private sector as the opportunity to re-expand their DSO to perform such work? Will authorities simply accept that it need not be assumed that services should be performed in house, and initiate tendering procedures with a view to engaging a new private sector contractor? Will authorities initiate a tendering exercise with a view to establishing whether direct service provision or the use of private contractors is more advantageous? A number of issues would have to be considered. Perhaps in situations where the CCT legislation concentrated the collective mind of authorities, a new set of circumstances and options will have to be evaluated. One thing is clear: even after its abolition CCT would continue to have a profound effect on local government due to the contractual relationships which it has created, and, perhaps more importantly the acceptance once again of the possibility of contracting out services as an alternative to direct service provision.

It is, however, possible that a Labour government would not seek to abolish CCT, but simply to revise the regime. Irrespective of the difficulties which may arise from attempts to abolish CCT, such an eventuality must be considered possible in view of "New" Labour's trend to shift away from its traditional economic principles towards embracing market economics: the most obvious manifestation of this was the removal of Clause Four from its constitution at a special party conference in April 1995. It is curious, however, that a Conservative government may also be forced to consider this course of action given that in a number of important respects the CCT regime conflicts with the EC public procurement regime. The revision of the CCT regime may thus take place irrespective of which political party is in power. However, what matters must be addressed in any revision.

A revision of the 1988 and 1992 Acts may re-evaluate which services should be subject to CCT, but any decision to remove a service from the list of defined activities would require an amendment to S2 of the 1988 Act. The most significant changes must be made to the tendering regime. More care must be taken to ensure the legal propriety of many aspects of the tendering regime. Subordinate legislation, particularly that relating to the definition of anti-competitive conduct, must be re-evaluated as it has too often failed to comply with the parameters set by the primary legislation. The most radical changes must occur in relation to the provisions on anti-competitive conduct: in particular a duty to avoid anti-competitive practices corresponding to that imposed on local authorities must be imposed upon private contractors. The position of the Guidance on anti-competitive conduct must receive special attention: while it is of vital importance in shaping the model of competition which the Government wish to pursue, it is disturbing that a document carrying such considerable prescriptive force lies outwith the purview of Parliamentary scrutiny. Therefore the issue of the Guidance, and any revision to it, should be laid before each House of Parliament. However, in considering the tendering regime the major issue to be addressed is the way in which so many elements of it, from the provisions of the 1988 and 1992 Acts through to those of the Guidance, conflict with the EC public procurement regime. Thus any revision of the legislation must produce a tendering regime which is consistent with the EC regime. While the legislation may still require that services must periodically be exposed to competition, other elements of the tendering regime will require wholesale revision in order to reflect the EC public procurement regime: some of the most obvious revisions are, for example, the clarification of the position on the number of potential contractors who should be invited to submit a tender, and the recognition of the ability of authorities to exclude contractors from participation in a contract award process in certain circumstances, and to decide for themselves which criteria should be taken into account in assessing tenders. Alongside this, one must appreciate that the provisions of the non-commercial considerations regime contained in Part II of the 1988 Act are of considerable relevance to tendering exercises conducted under Part

I, and consequently must also undergo some degree of revision to ensure their consistency with EC law.

When considering the CCT regime one must also consider the Secretary of State's powers contained in S13 and S14. It would probably be unnecessary to revise these. There are two significant reasons for this. While these powers are intended to be the main avenue for redress of failures to comply with the tendering regime, and while the procedure does not accord with the provisions of the Compliance Directive, aggrieved contractors may still avail themselves of rights of action before the courts which do satisfy the Directive's provisions. Secondly, the procedure contained in S13 and S14 also provides a means of sanctioning authorities for significant failures in DSO performance, and will continue to be of considerable value in doing so. However, in operating that system of sanctions one must appreciate the relevance of the 1988 Act's accounting provisions, particularly the requirement, effectively, for DSOs to produce a specified rate of return on capital employed: a Secretary of State who wished the 1988 Act to have a less oppressive effect on DSOs need only lower the rate of return on capital employed, therefore. Alternatively, having received an explanation from the authority, he may simply exercise his discretion not to apply the sanctions contained in S14, or only apply the least onerous sanctions.

In discussing the future of CCT one must also consider its place within the changing institutional structure of government. As has been noted²³ recent changes in the institutional structure of government appear to have been made with reference more to economic than political criteria. This has resulted in the emergence of executive agencies in central government, and the application of the concept of the enabling authority to the reorganisation of local government. Of considerable importance to both of these initiatives is the application of market based techniques in making decisions about the delivery of services. Thus the activities of central government are subject to the prior options test in order essentially to assess the whether they should be performed by government, and,

²³ Part I, Chapter 5

amongst other things, whether the services performed by agencies should be the subject of a market testing exercise. In local government the Government's preferred model for the authorities which will emerge from reorganisation is the enabling authority. The particular model of the enabling authority which the present Government adheres to is little more than a contracting authority. As the process of restructuring the scope and institutions of government by reference to market-based criteria is a well advanced one, questions arise as to the ability of a subsequent administration to reverse this process. It is fairly certain that a Conservative administration will continue this process. The way in which a Labour administration would deal with this process is less certain, although the party's increasingly pragmatic approach to the place of market forces in economic policy would tend to indicate that it may not reverse these initiatives immediately. Indeed, given that the process of establishing executive agencies is so well advanced, and that enabling authorities have a statutory basis, any attempt to replace either may take some time, and will require to be very well thought out, and to show greater consideration of political, as opposed to economic, factors in determining the role and institutional structure of government.

The way in which market-based techniques increasingly permeate decisions concerning the role and institutions of government, and the way in which services are delivered raises one final issue. While tendering regimes such as that established by the 1988 and 1992 Acts set out conditions precedent to the formation of the contracts of public authorities, there is no special body of law regulating such contracts after their formation. Some recognition must be given to the distinct and special nature of the contracts of public authorities, and that it is naive to expect all aspects of them post-formation to be governed by the same principles as contracts between private parties. Consequently, greater thought should be devoted to the possibility of establishing a set of principles to regulate the contracts of public authorities post-formation: this should address, for example, the circumstances in which variation and termination are permitted and the position of sub-contractors. The trend towards the greater use of contractual relationships in

the delivery of services can only accentuate the need to establish a coherent set of principles regarding the contracts of public authorities. Irrespective of the United Kingdom Government's willingness to give consideration to the establishment of a coherent set of principles to regulate the contracts of public authorities the EC must realise that, in view of the increased use of contractual relationships as an instrument of government, and especially in view of its own role in setting conditions precedent to the formation of the contracts of public authorities, it is logical that it should assume a role in regulating such contracts after their formation.

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